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1306 No. 3796 1307

United States Circuit Court of Appeals

For the Ninth Circuit.

CHIN TOO,

Appellant,

vs.

RICHARD L. HALSEY, as Immigration Inspector in Charge at the Port of Honolulu,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Territory of Hawaii.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3796

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

Names and Addresses of Attorneys of Record.

For Petitioner, Chin Too:

Messrs. WATSON CLEMONS & HITE, 416–418 Kauikeolani Building, Honolulu, T. H.,

For Respondent, RICHARD L. HALSEY, Esq., U. S. Immigration Inspector in Charge at the Port of Honolulu:

S. C. HUBER, Esq., United States District. Attorney.

N. D. GODBOLD, Esq., Assistant U. S. District Attorney. [1*]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Statement.

TIME OF COMMENCING SUIT:

February 25th, 1921: Verified petition for writ of habeas corpus filed. Order to show cause issued.

NAMES OF ORIGINAL PARTIES:

Petitioner: Chin Too.

Respondent Richard L. Halsey, Esq., U. S. Inspector of Immigration in charge at the port of Honolulu.

DATES OF FILING OF THE PLEADINGS:

February 25th, 1921: Petition.

February 28th, 1921: Return of Richard L. Halsey, to order to show cause.

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*Page number appearing at foot of page of original certified Transcript of Record.

SERVICE OF PROCESS:

February 25th, 1921: Acceptance of service by U. S. Attorney of petition and order to show cause.

March 10th, 1921: Acceptance of service by U. S. Attorney of writ of habeas corpus.

PROCEEDINGS:

February 28th, 1921: Hearing on return to order to show cause, taken under advisement.

March 24th, 1921: Hearing on return to writ of habeas corpus, taken under advisement.

April 9th, 1921: Decision, exception, notice of appeal and order fixing bond.

The above hearings were had before the Honorable HORACE W. VAUGHAN, Judge of the above-entitled court. [2]

DECISION.

April 9th, 1921: Decision filed, HORACE W. VAUGHAN, Judge.

April 13th, 1921: Judgment filed and entered, HORACE W. VAUGHAN, Judge.

April 20th, 1921: Petition for appeal.

United States of America,
District of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the United States District Court in and for the District and Territory of Hawaii, do hereby certify the foregoing to be a full, true and correct statement showing the time of commencement of the above-entitled suit; the names of the original parties thereto; the several dates when the respective pleadings were filed; and account of the proceedings showing the acceptance of service of the

order to show cause and writ of habeas corpus and the time when the judgment herein was rendered and the Judge rendering the same, in the matter of the Application of Chin Too for a Writ of Habeas Corpus, No. 165, in the United States District Court in and for the District and Territory of Hawaii.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 4th day of October, A. D. 1921.

[Seal] WM. L. ROSA,

Clerk, United States District Court, in and for the District and Territory of Hawaii. [3]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Order Extending Time to June 18, 1921, to Transmit Record on Appeal.

Now, on this 20th day of May, A. D. 1921, it appearing from representations of the clerk of this court that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause,

together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to June 18, 1921.

HORACE W. VAUGHAN,
Judge, U. S. District Court, Hawaii.

Filed May 20, 1921. Wm. L. Rosa, Clerk. By ————, Deputy Clerk. [4]

In the United States District Court for the Terrtory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Order Extending Time to July 18, 1921, to Transmit Record on Appeal.

Now, on this 18th day of June, A. D. 1921, it appearing from representations of the clerk of this court that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of

Appeals, be, and the same is hereby extended to July 18, 1921.

HORACE W. VAUGHAN,
Judge, U. S. District Court, Hawaii.

Filed June 18, 1921. Wm. L. Rosa, Clerk. By ————, Deputy Clerk. [5]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Order Extending Time to August 17, 1921, to Transmit Record on Appeal.

Now, on this 18th day of July, A. D. 1921, it appearing from representations of the clerk of this court that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to August 17, 1921.

HORACE W. VAUGHAN,
Judge, U. S. District Court, Hawaii.

Filed July 18, 1921. Wm. L. Rosa, Clerk. By ————, Deputy Clerk. [6]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Order Extending Time to September 17, 1921, to Transmit Record on Appeal.

Now, on this 18th day of August, A. D. 1921, it appearing from representations of the clerk of this court that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to September 17, 1921.

HORACE W. VAUGHAN,
Judge, U. S. District Court, Hawaii.

Filed Aug. 18, 1921. Wm. L. Rosa, Clerk. By ————, Deputy Clerk. [7]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Order Extending Time to October 17, 1921, to Transmit Record on Appeal.

Now, on this 17th day of September, A. D. 1921, it appearing from representations of the clerk of this court that it is impracticable for said clerk to prepare and transmit to the clerk of the Ninth Circuit Court of Appeals, at San Francisco, California, the transcript of the record on assignment of error in the above-entitled cause, within the time limited therefor by the citation heretofore issued in this cause, it is ordered that the time within which the clerk of this court shall prepare and transmit said transcript of the record on assignment of error in this cause, together with the said assignment of errors and all papers required by the praecipe of plaintiff in error herein, to the clerk of the Ninth Circuit Court of Appeals, be, and the same is hereby extended to October 17, 1921.

HORACE W. VAUGHAN,
Judge, U. S. District Court, Hawaii.

Filed Sept. 17, 1921. Wm. L. Rosa, Clerk. By ————, Deputy Clerk. [8]

In the United States District Court of the Territory of Hawaii. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Petition for Writ of Habeas Corpus. Filed Feb. 26, 1921. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. Watson & Clemons, Attorneys for Petitioner, 417 Kauikeolani Building, Honolulu, T. H.

Service of copy accepted Feb. 26th, 1921.

RICHARD L. HALSEY,
Respondent.
By (Sgd.) S. C. HUBER,
U. S. Atty.,
His Atty. [9]

In the United States District Court of the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable HORACE W. VAUGHAN, Judge of said Court:

The petition of Chin Too respectfully shows:

1. That he is a resident of Honolulu, in the City and County of Honolulu, Territory of Hawaii, and has resided in the Hawaiian Islands about twenty-eight or more years.

2. That he is the holder and entitled to the benefits of Laborer's Return Permit No. 4380/1371, issued to him under the laws and regulations of the United

States of America, relating to the immigration of Chinese, said permit showing that he departed for China by the steamship "Shinyo Maru" on May 13th, 1920.

3. That having departed for China as aforesaid from the port of Honolulu, in said Territory, he returned to said port by said steamship on December 13th, 1920, and was then fully entitled to land in and be admitted to said United States, and was under no legal disability or disqualification to prevent his so landing.

4. But that now and ever since said last date, he is and has been imprisoned and unlawfully restrained of his liberty by Richard L. Halsey, Inspector in Charge of the United States Immigration Station at said port of Honolulu.

5. That the true cause or pretense of the imprisonment or restraint aforesaid is a certain order of a Board of Special Inquiry [10] of said Immigration Station made, to wit, December 17th, 1920, denying the petitioner admission into the United States on the ground of being a polygamist and a person who practices polygamy as set forth in section 3 of the Immigration Act of February 5th, 1917, and a certain order of the Secretary of Labor of the United States of America thereafter made affirming said order of said Board.

6. That said order of said Board and of said Secretary of Labor was based upon a so-called hearing before said Board, but that said hearing was unfair, and was a mere semblance of a hearing.

7. That hereto annexed and made a part hereof is

a true and complete copy of the record and proceedings in said matter and hearing before said board.

8. That said order is contained and shown in the following proceedings, which are set out at length at page 4 of said Exhibit to wit:

"JACKSON L. MILLIGAN.—The testimony of this applicant, under oath, clearly shows that while he had a lawful wife living in China he married another woman here according to the laws of this Territory and the United States.

I, therefore move that he be denied admission to the United States as a polygamist and as a person who practices polygamy, as set forth in Section 3 of the Immigration Act of February 5th, 1917, and that he be ordered returned to the country from whence he came, i. e., China.

So far as his qualifications under the Chinese Exclusion Act are concerned he would be admissible.

HAZEL G. MASER.—I second the motion.

HARRY B. BROWN (Chairman).—I concur in the above motion and would state that this applicant seems to have followed the course of quite a large number of other Chinese in this Territory who are unable to bring their wives from China, and, knowing that they will probably live here the greater part of their lives, have married here. Undoubtedly some of these men have gone to China and returned but were not honest enough to admit their plural marriage and thereby secured admission. We know from the decision in the case of Lee Sau, a Chinese Laborer, Bureau file No. 54898/106 of November 2nd, 1920, which only recently reached this office that

a Chinese having a lawful wife and a secondary wife in China is admissible but the case of this applicant is somewhat different as he was legally married to a woman in China under the laws and customs of that country and while that woman was still living he contracted another marriage in accordance with the law of this Territory. [11]

As this alien is denied under the Immigration Law the ten days' notice within which to produce further evidence under the Chinese Exclusion Law is not applicable.

CHAIRMAN (to Applicant).—12/17/1920, A. M. (Through Interpreter Hee Kong.) You are informed that you have been denied admission to the United States as a polygamist and as a person who practices polygamy as set forth in Section 3 of the Immigration Act of February 5th, 1917, and are hereby ordered returned to the country from whence you came, i. e., China."

9. That this petitioner claims that said proceedings were and are erroneous in law, in that the record shows, in said exhibit at pages 1 and 2, that the alleged lawful wife in China had died in the second month of the year 1920, so that at the time of his arrival on return to Hawaii in December, 1920, he was no longer, if ever, a polygamist, or practicing polygamy; and that, therefore, as a matter of law, said order of the Board of Special Inquiry and its affirmance on appeal by the Secretary of Labor, were and are unjustified and invalid.

10. And further this petitioner claims that on his appeal aforesaid to the Secretary of Labor the deci-

sion and ruling of the Secretary was and is erroneous on the face of the record, in this that it is based on the assumed fact that the petitioner has now in China a wife to whom he is legally married, which assumption is contrary to the finding of the said Board which is affirmed by the Secretary, the finding of the Board having been based upon the motion of Inspector Milligan, appearing at page 4 of said record in exhibit, which predicates the alleged polygamy upon the marriage to the first wife, to wit, Fong She, but who is now dead. The pertinent part of the Secretary's ruling is as follows:

> "This Chinese person has been excluded at Honolulu as a polygamist. The record shows that he has in China a wife to whom he is legally married according to the customs of the country, and also that he has a wife in Honolulu to whom he [12] is married according to the laws of the United States. His exclusion therefore clearly was justified."

And this petitioner claims that this ruling of the Secretary is, accordingly, erroneous and invalid, and cannot in law be the basis of his exclusion from this country.

WHEREFORE, the petitioner prays that a writ of habeas corpus be issued out of this Honorable Court commanding the said Richard L. Halsey to have and produce the body of the petitioner before this Court at time and place as it may direct, and that as soon as allowable by law the petitioner may be enlarged upon bond in such amount as may be deemed reasonable by your Honor.

Honolulu, February 25th, 1921.

(Sgd.) CHIN TOO,
Petitioner.

WATSON & CLEMONS,
417 Kauikeolani Building,
Honolulu, T. H.,
Attorneys for Petitioner.

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Chin Too, being first duly sworn on oath, deposes and says, that he is the petitioner herein, and that he has heard read the foregoing petition and that the same is true.

(Sgd.) CHIN TOO.

Subscribed and sworn to before me this 25th day of February, A. D. 1921.

(Sgd.) H. P. O'SULLIVAN,
Notary Public, First Judicial Circuit, Territory of Hawaii.

At Chambers, Honolulu, March 10th, 1921.

Let the writ of habeas corpus issue as prayed for returnable March 11th, 1921, at 2 P. M.

(Sgd.) HORACE W. VAUGHAN,
Judge. [13]

Exhibit "A."

UNITED STATES IMMIGRATION SERVICE.
PORT OF HONOLULU,
T. H.

File 4380/1371.

Record of the Board of Special Inquiry—Convened December 15th, 1920.

Members of Board: HARRY B. BROWN, Chairman,
JACKSON L. MILLIGAN and
HAZEL G. MASER.

HEE SAU HOY, Interpreter.

HAZEL G. MASER, Stenographer.

Case of—CHIN TOO, Returning Laborer, S/S "Shinyo Maru" December 13th, 1920.

NOTE: Applicant presents laborer's return permit No. 4380/1371 showing that he departed for China per S/S "Shinyo Maru" on May 13th, 1920.

Applicant sworn, testifies:

Q. What is your name and age?

A. Shin Too, *alias* Chin Young Chew, 47.

Q. Where were you born?

A. Poon Tong village, Sun Ning District, China.

Q. When did you first come to Hawaii?

A. About 28 or 29 years ago.

Q. How old were you when you first came to Hawaii? A. 17.

Q. How many trips have you made back to China?

A. Four.

Q. When you first came to Hawaii how long did

you stay here before making your first trip to China? A. 5 years.

Q. What is your occupation? A. Laundryman.

Q. Do you desire a friend or relative present during the hearing of your case? A. No.

Q. How many times have you been married?

A. I was first married to Fong She (Kwong She).

Q. When were you married to her?

A. When I was 22—in China.

Q. Where is she now?

A. Dead she died at Poon Kong village.

Q. When did she die?

A. Second month of this year.

Q. How many children did she have?

A. One son and two daughters.

Q. What are their names and ages?

A. Son is Chin Cheong, 17, and daughters are Chin Han Nui, 22 or 23, and Chin Sim Nui, 11, the oldest one is married in China.

Q. Where are they all living? A. In China.

Q. Did you have any other wives?

A. Yes Chang She.

Q. When did you marry her?

A. I did not marry her.

Q. Did she live with you in China?

A. Yes for two months and then ran away.

Q. You made a statement in this office yesterday and then you did not say anything about her running away from you?

A. I was not asked anything about that.

Q. Did you take that woman Chang She as your

lawful wife or as a concubine while you were in China?

A. She only came to my house to live with my mother and take care of my children.

Q. Did you take her as a legal wife or as a concubine? A. No.

Q. Why did you say yesterday that you married her and that her name was Chang She?

A. I did not marry her—she only took care of my children and mother.

Q. Yesterday you said you married Chang She in June of this year— now why did you say you were married if you were not?

A. Yes, we were married and she was not satisfied so ran away from me.

Q. Who have you taking care of your mother and children in China now then?

A. My mother takes care of the place herself.

Q. You just told us that you had gotten this other woman to take care of the place—now who has taken this woman's place?

A. My mother is still young enough to take care of the place herself.

Q. Now, you told us just a few minutes ago that you took this woman Chang She to your house to take care of your mother and children and now you say your mother does not need anyone to take care of her?

A. That woman may come back to my house, I do not know. [14]

Applicant sworn, testifies (continued):

Q. Have you any other wives?

A. Yes; I have a wife in Hawaii.

Q. What is her name?

A. Marie Donya—she is Spanish, I think—dark like a Hawaiian.

Q. When were you married to her?

A. About 7 years ago.

Q. Where? A. Honolulu.

Q. Have you any children by her?

A. Two sons and one daughter.

Q. What are their names and ages?

A. Sons are Chin Mo Sun, 13, and Chin Min Kwock, 6, both of them were born in Hawaii and are now in China—I took them back there with me; the girl is Chin Min Koon, 3, born in Hawaii and now here.

Q. Were the children by your wife in Hawaii all born here? A. Yes.

Q. Who performed the marriage ceremony of this woman Marie Donya and yourself?

A. A minister who had a hardware store on King Street near Smith Street (probably refers to Abraham Fernandez),

Q. Was it Mr. Fernandez? A. I do not know.

Q. Did you get a license to marry? A. Yes.

Q. How long did you live with this Marie before you married her? A. Nearly a year.

Q. Who does the child Chin Mo Sun belong to?

A. That child is by her first husband and I have adopted him.

Q. Did you adopt him according to law in the courts? A. Yes—I have a paper from the courts.

Q. Were you living with Marie up until you left

for China on this trip? A. Yes.

Q. Did any of the officers in this Territory get after you for living with this woman Marie and cause you to marry her or did you do it of your own free will? A. It was of my own free will.

Q. Were you summoned before the police for living with this woman? A. No.

Q. Were you in China when your first wife Fong She died? A. I was here.

Q. When did you make your trip to China before this trip? A. When I was 35 years old.

Q. How old are you now? A. 47.

Q. When was this second trip to China?

A. When I was 28.

Q. How do you know your first wife Fong She died in China in the first part of this year?

A. My mother wrote me a letter about it.

Q. Did you send money all the time to support your family in China? A. Yes.

Q. How often? A. About four times a year.

Q. How often would you receive letters from your home in China? A. About 6 times a year.

Q. Would they be sent by your mother or your wife Fong She? A. From my mother.

Q. Would those letters explain to you the condition of the health of the family and how your wife and children were getting along? A. Yes.

Q. So you know positively then that your wife Fong She did not die until the 2d month of this year? A. Yes.

Q. What is the name of your mother?

A. Yee She, she is 60.

Q. Bound or natural feet? A. Bound.

Q. Did your wife Fong She have bound or natural feet? A. Natural.

Q. Was she the first wife you ever had.

A. Yes.

Q. And when she came to your house did you have the usual Chinese marriage ceremony performed? A. Yes.

Q. And during all those years was she known as your lawful wife and did you consider her as such?

A. Yes.

Q. Why did you never bring her to Hawaii?

A. I was always a laundryman and so could not bring her here under the law.

Case of Chin Too, returning laborer, ex S/S "Shinyo Maru," Dec. 13th, 1920, file 4380/1371. 12/15/1920. [15]

Applicant sworn, testifies (Continued):

Q. What were your reasons for marrying this woman in Hawaii when you had another wife living in China?

A. She gave me her son and asked be to take care of him and then later I married her.

Q. If you had been permitted to bring your wife from China would you have married this woman here?

A. If I could have brought my wife from China I would never have married here—I would have sent for my Chinese wife.

Q. Did you take any money, letters or anything else from the United States to anyone in China on this trip?

A. Took $10.00 from Chun Fong Bung to his mother; took $10.00 from Chim Yook to his wife.

Q. Did you see any resident or former resident of this country during your recent stay in China?

A. Saw Chun Goon, Chun Hong, Chin Min, that is all.

Q. Did you visit the home of any resident or former resident of this country?

A. Went to the house of the three persons mentioned above.

Q. Did you see the son of any resident or former resident of this country? A. No.

Q. Did you attend any weddings? A. No.

Q. Anything further to say? A. No.

Applicant signed Note-book (Tracing).

NOTE: Records of this office show the following:

That this applicant was issued Return Permit No. 20056 on July 4th, 1903, and went to China, returning the following year.

That he was again issued Return Permit No. 24095 on March 15th, 1909, and departed for China returning on October 21st, 1910.

Case of Chin Too, returning laborer, ex S/S "Shinyo Maru," Dec. 13th, 1920, file 4380/1371. 12/15/1920. [16]

December 17th, 1920.

Same board reconvened.

MOTION.

JACKSON L. MILLIGAN.—The testimony of this applicant, under oath, clearly shows that while

he had a lawful wife living in China he married another woman here according to the laws of this Territory and the United States.

I, therefore, move that he be denied admission to the United States as a polygamist and as a person who practices polygamy, as set forth in Section 3 of the Immigration Act of February 5th, 1917, and that he be ordered returned to the country from whence he came, i. e., China.

So far as his qualifications under the Chinese Exclusion Act are concerned he would be admissible.

HAZEL G. MASER.—I second the motion.

HARRY B. BROWN (Chairman).—I concur in the above motion and would state that this applicant seems to have followed the course of quite a large number of other Chinese in this Territory who are unable to bring their wives from China, and knowing that they will probably live here the greater part of their lives, have married here. Undoubtedly some of these men have gone to China and returned but were not honest enough to admit their plural marriage and thereby secured admission. We know from the decision in the case of Lee Sau, a Chinese Laborer, Bureau File No. 54898/106 of November 2d, 1920, which only recently reached this office that a Chinese having a lawful wife and a secondary wife in China is admissible but the case of this applicant is somewhat different as he was legally married to a woman in China under the laws and customs of that country and while that woman was still living he contracted another marriage in accordance with the law of this Territory.

As this alien is denied under the Immigration Law the ten days' notice within which to produce further evidence under the Chinese Exclusion Law is not applicable.

CHAIRMAN (to Applicant).—12/17/1920 A. M. (Through Interpreter Hee Kwong.) You are informed that you have been denied admission to the United States as a polygamist and as a person who practices polygamy as set forth in Section 3 of the Immigration Act of February 5th, 1917, and are hereby ordered returned to the country from whence you came, i. e., China.

From this decision you have the right to appeal your case to the Secretary of Labor, at Washington, D. C., either with or without the services of an attorney, and in case you desire to avail yourself of this right you must so notify the Inspector in Charge within forty-eight hours from the time of this notice.

In case you are finally returned to China all expenses incident to such return will be borne by the steamship company bringing you here, and you will be returned in the same class in which you came, i. e., steerage.

(Signed) HAZEL G. MASER,
Stenographer.

Certified correct.

Case of Chin Too, returning laborer, ex S/S "Shinyo Maru," Dec. 13th, 1920. File 4380/1471. 12/17/1920. [17]

U. S. IMMIGRATION SERVICE.

No. 4380/1371.

Port of Honolulu, Hawaii,
May 8, 1920.

Case of CHIN TOO, Chinese Laborer, Return Permit.

Inspector—EDWIN FARMER.

Interpreter—HEE KWONG.

Applicant sworn, testifies: CR. #11521.

Name and age: Chin Too, *alias* Chin Leang Chu, 45 yrs. Born at Poon Tong, China. In Hawaii, a little over 25 yrs. Been back to China three times; first time, when I was 22 yrs. old and returned to Hawaii the next year; second time, about six years after my return from the first trip, and returned to Hawaii the next year, third time, a little over six years after my return from my second trip, and returned 18 months later. Am married, wife, Donya, a Porto Rican, in Honolulu. Children: Two sons, Chin Ming Kwock, born in 1914, and Chin Ming Koon, born in 1916. I also have an adopted son, Chin Moo Sun, 12 or 13 years old, the son of my wife by her former husband, who is dead. No daughters. Occupation: Laundryman in Honolulu. I should state that I was married formerly to a Chinese woman, who is dead, and have a son and a daughter by her, Chin Chong, 15 or 16 yrs., and a girl, Chin Hang Nui, about 20, both born in China and now in China. Parents: Father dead; mother living in China. Property: Sole owner of two laundries. But I want to qualify on debts due. Chun Mon owes me $512.50, and

Chun Bun owes me $532.00, borrowed. Neither gave me a note. (Presents a book with name on it and many accounts in it. Account of Chun Mon: June 25, 1919, loaned him $75.00; Sept. 10, 1919, $185.00; Dec. 25, 1919, $340.00; Feb. 4, 1920, $87.50; Oct. 20, 1919, he paid back $30.00 April 1, 1920, $145.00 Account of Chun Bun: It is a long account. The balance figures out that he owes applicant $532. These accounts are true and correct. None of that money has been paid back except as shown. Address in China: Kung Wo Tseong, Hong Kong. I can read. (Illiteracy test explained.) No more to say.

(Signed in Chinese characters.)
(CHIN TOO.)

Witness sworn, testifies: CI. #25422, red, HB.

Name and age: Chin Bin, *alias* Chin Wing Bin, 23 yrs. (Family record on file.) Come as witness for Chin Too, going to China. I owe him $532.00 borrowed. Did not give note. (Presents book with name on it and one account in it. It agrees with applicant's book. That account is true and correct. None of that money has been paid back except as shown. Have known Chin Too many years. Saw him in China when he went back. No more to say.

(Signed in Chinese characters).
(CHIN BIN.)

Witness, sworn testifies: CR. #27473, verified Feb. 6, 1912.

Name and age: Chun Moon, *alias* Chun Mun Gai, 51 yrs. (Family record on file.) Come as witness

for Chin Too, going to China. I owe him $512.50, borrowed. Did not give note. (Presents book with name on it and one account in it. It agrees with applicant's book.) That account is true and correct. None of that money has been paid back except as shown. Have known Chin Too many years. No more to say.

(Signed in Chinese characters.)
(CHUN MOON.)
May 8, 1920.

FINDING.

It is recommended that the applicant be granted a return permit on debts due, as seems to be shown by the above evidence.

EDWIN FARMER,
Immigrant Inspector.

Approved:

RICHARD L. HALSEY.
Inspector in Charge. [18]

In the United States District Court of the Territory of Hawaii. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Order to Show Cause. [19]

In the United States District Court of the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Order to Show Cause.

The United States of America to RICHARD L. HALSEY, Inspector in Charge of Immigration at the Port of Honolulu:

The petition for a writ of habeas corpus having been filed in the above-entitled court and this date presented to me, one of the Judges of said court, by one Chin Too, alleging that he is unlawfully restrained of his liberty and imprisoned by you, contrary to the Constitution and the laws of the United States of America, and a copy of which petition is ordered to be served upon you with this writ, you are hereby notified and required to be and appear before me in the courtroom of the United States, in the Model Block in Honolulu, City and County of Honolulu, Territory of Hawaii, on Monday, the 28th day of Feb., A. D. 1921, at 2 o'clock P. M. of said date, or at such other time as may suit the convenience of the court, to show cause, if any you have, why said writ of habeas corpus should not be issued as prayed for in said petition.

(Sgd.) HORACE W. VAUGHAN,
Judge.

[Seal] Attest: A. E. HARRIS,
Clerk.

By (Sgd.) Wm. L. Rosa,
Deputy Clerk. [20]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application

of Chin Too for a Writ of Habeas Corpus. Return of Richard L. Halsey to Order to Show Cause. Filed Feby. 28, '21. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. S. C. Huber, United States Attorney, N. D. Godbold, Assistant U. S. Attorney.

Due and legal service of within return hereby accepted and receipt of copy acknowledged at 2 P. M. Feb. 28, 1921.

WATSON & CLEMONS.
(Sgd.) C. F. C. [21]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Return of Richard L. Halsey to Order to Show Cause.

Comes now Richard L. Halsey, respondent herein, and in obedience to the orders of the Court heretofore made hereby certifies and returns as follows:

I.

That respondent is now and for many years last past has been Inspector in Charge of the United States Immigration Station at Honolulu, Hawaii.

II.

That he denies each and every allegation contained in applicant's petition for Writ of Habeas Corpus herein, except as hereinafter admitted.

III.

Respondent admits paragraphs 2, 7 and 8 of said petition.

IV.

That applicant Chin Too is an alien and a citizen of the Republic of China, and was such alien at all times referred to in said petition and hereinafter referred to in this return. [22]

V.

That on the 13th day of December, 1920, petitioner arrived at the Port of Honolulu, Territory of Hawaii, and sought to be admitted to the United States, and on the 15th day of December, 1920, appeared before a duly and regularly constituted Board of Special Inquiry of the Immigration Department of the United States, which said Board gave said applicant a full, fair and impartial hearing at which petitioner was granted every right accorded him by law, and as a result of said hearing said Board of Special Inquiry found that petitioner was not entitled to be admitted to the United States and made an order denying him the right of admission and making an order that he be returned to China the country from whence he came, all of which is fully set out in Exhibit "A" and made a part of paragraph 7 of applicant's petition and hereby by reference made a part of this return.

VI.

That from the decision of said Board of Special Inquiry petitioner took an appeal to the Secretary of Labor of the United States, and that said Secretary of Labor duly considered said case upon appeal and after fully, fairly and impartially considering the same found the findings of said Board of Special Inquiry to be correct, and sustained the findings and

order of said Board and dismissed applicant's appeal, a copy of the decision and order of the Secretary upon appeal being hereto attached marked Exhibit "1" and hereby made a part of this return.

VII.

That respondent is detaining petitioner at the United States Immigration Station at Honolulu, Hawaii, for return to China solely by reason of the findings and order of said Board [23] of Special Inquiry and of the Secretary of Labor.

WHEREFORE, respondent prays that applicant's petition be dismissed at his costs.

(Sgd.) RICHARD L. HALSEY.

United States of America,
Territory of Hawaii,—ss.

Richard L. Halsey, being first duly sworn according to law, deposes and says: that he is the Richard L. Halsey who has made the return to the order to show cause in the above-entitled cause; that he has read the said return, and knows the contents thereof and that the facts therein stated are true.

(Sgd.) RICHARD L. HALSEY.

Subscribed and sworn to before me this 28th day of February, A. D. 1921.

[Seal] (Sgd.) WM. L. ROSA,
Deputy Clerk, United States District Court, Territory of Hawaii. [24]

Exhibit No. 1.

No. 54994/48. February 2, 1921.

In re CHIN TOO.

This Chinese person has been excluded at Honolulu as a polygamist. The record shows that he has in China a wife to whom he is legally married, according to the customs of that country, and also that he has a wife in Honolulu, to whom he has been married according to the laws of the United States. His exclusion clearly therefore was justified.

Inspector Brown, Chairman of the Board, in concurring in the motion of Inspector Milligan for exclusion, in a very few words distinguishes this case from that of Lee Sau, recently admitted by the Department, on appeal. It is the understanding of the Department that, under Chinese custom, it is possible for a man to have but one lawful wife; the other women who come into his household are concubines; the children of the latter are regarded as the children of the wife, and the wife is at all times the supreme head of the household, the concubines occupying practically the position of servants. To the Chinese there is not even immorality in this, although it is something that would not be countenanced for a minute, in the United States. Chinese men of this class do not seem to be covered by any provision of the immigration laws. They are not polygamists under the laws and customs of their own country, because they are married only once, and for the same reason, they

are hardly to be regarded as polygamists under our laws. Under Chinese customs Lee San had only one wife, while Chin Too, the applicant in this case, has two wives, one in China and one in Honolulu, and to both of them he is legally married. If he had never legally married the woman in Honolulu he would certainly not be a polygamist, at least he would not have committed an act of polygamy, and his status would then be almost, if not quite the same, as that of a Chinaman having a wife and a concubine in China with the exception that the fact of his living in this country with a woman not his wife would be regarded as reprehensible, and probably covered by statute, while in China his conduct would have been an every day affair, countenanced by the customs of the country.

The action of the board in excluding Chin Too was correct, and the appeal is therefore dismissed.

(Sgd.) LOUIS F. POST,
Assistant Secretary.

CEB. [25]

(Proceedings—Return to Order to Show Cause, Taken Under Advisement.)

From the Minutes of the United States District Court, Territory of Hawaii.

Monday, February 28th, 1921.

(Title of Court and Cause.)

On this day came Mr. Chas. F. Clemons, of the firm of Watson & Clemons, counsel for the appli-

cant, and also came Mr. S. C. Huber, United States District Attorney, counsel for the repondent herein, and this cause was called for hearing on the return to the order to show cause. Thereupon, and after due hearing, this matter was taken under advisement by the Court. [26]

In the United States District Court of the Territory of Hawaii. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Writ of Habeas Corpus. Filed Mar. 10, 1921. A. E Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk.

Service accepted Mch. 10th, 1921.

RICHARD L. HALSEY,
Respondent.
By (Sgd.) S. C. HUBER,
U. S. Atty.,
His Atty. [27]

In the United States District Court of the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to R. L. HALSEY, Inspector in Charge of Immigration in and for the District and Territory of Hawaii:

We strictly command and enjoin you that you have and produce before the United States District Court, in and for the District and Territory of

Hawaii forthwith, the body of Chin Too, and that you do on the 11th day of March, A. D. 1921, at the hour of 2 o'clock P. M., in the courtroom of said court at Honolulu, disclose the cause of his imprisonment and detention and then and there receive, undergo and have what the said United States District Court shall consider right, and in accordance with the law of the land, concerning him, the said Chin Too, and to abide the judgment of the Court in this behalf.

And we do hereby further command the United States Marshal in and for the District and Territory of Hawaii to serve this writ of habeas corpus upon the said R. L. Halsey, and make due return hereof, together with this writ.

WITNESS the Honorable HORACE W. VAUGHAN, Judge of the United States District Court, in and for the District and Territory of Hawaii, this 10th day of March, A. D. 1921.

By the United States District Court:

[Seal] A. E. HARRIS,

Clerk of the Above-entitled Court.

By (Sgd.) Wm. L. Rosa,

Deputy. [28]

(Proceedings—Return to Writ of Habeas Corpus, Taken Under Advisement.)

From the Minutes of the United States District Court, Territory of Hawaii.

Thursday, March 24th, 1921.

(Title of Court and Cause.)

On this day came Mr. Chas. F. Clemons, of the firm of Watson & Clemons, counsel for the applicant, and also came Mr. S. C. Huber, United States District Attorney, counsel for the respondent herein, and this cause was called for hearing on the return to the writ of habeas corpus. Thereupon and after due hearing, this matter was taken under advisement by the Court. [29]

In the United States District Court, in and for the Territory of Hawaii. No. 165. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Stipulation. Filed Mar. 17, 1921. A. E. Harris, Clerk. By (Sgd.) Wm. L. Rosa, Deputy Clerk. S. H. Huber, United States Attorney. N. D. Godbold, Assistant United States Attorney. [30]

In the United States District Court, in and for the Territory of Hawaii.

No. 165.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Stipulation Re Hearing.

IT IS HEREBY STIPULATED by and between the respective parties hereto that the return of respondent heretofore filed in this case to the order to show cause be and it hereby is made the return to the writ of habeas corpus issued herein and that the hearing upon said writ shall proceed on the issues thus joined.

March 15, 1921.

RICHARD L. HALSEY,
Respondent.
By (Sgd.) S. C. HUBER,
United States Attorney,
His Attorney.
CHIN TOO,
Petitioner.
By WATSON & CLEMONS,
(Sgd.) C. F. C., His Attorneys. [31]

(Proceedings—Decision, Exception, Notice of Appeal, Order Fixing Bond.)

From the Minutes of the United States District Court, Territory of Hawaii.

Saturday, April 9th, 1921.

(Title of Court and Cause.)

On this day came Chas. F. Clemons, Esq., of the firm of Watson & Clemons, counsel for the applicant, and also came N. D. Godbold, Esq., Assistant United States District Attorney, counsel

for the respondent herein, and this cause was called for decision. Thereupon the Court read its decision discharging the writ of habeas corpus heretofore issued herein, to which ruling Mr. Clemons entered an exception and gave notice of appeal. Thereafter the Court fixed bond on appeal in the sum of One Thousand Dollars ($1000.00). [32]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Opinion.

WATSON & CLEMONS, Attorneys for Petitioner.

S. C. HUBER, United States Attorney, and N. D. GODBOLD, Assistant United States Attorney, for RICHARD L. HALSEY, Respondent.

HORACE W. VAUGHN, Judge.

Filed Apr. 9, 1921. Wm. L. Rosa, Clerk. [33]

SYLLABUS.

Aliens—Immigration.—Though a Chinese alien may have such status that he is not excluded by any of the Chinese exclusion laws, he may come within some of the excluding clauses of the immigration laws.

Aliens—Immigration—Polygamy—A Chinese who, while living in the United States, contracts a polygamous marriage, having a wife then living in China, and lives with his polygamous wife before his departure for a temporary visit

to China, seeking re-entry upon return from such temporary visit, is within the clause of the immigration law excluding those who believe in or practice polygamy.

Aliens — Immigration — Seeking Writ of Habeas Corpus to obtain release must show right to enter or re-enter. [34]

OPINION.

The applicant in this case was a resident of Honolulu, having resided in the Territory of Hawaii for many years preceding his departure for a temporary visit to China on May 13, 1920. Before his departure he obtained a laborer's return permit entitling him to return or rather to exemption from the provisions of the laws excluding Chinese laborers. Within the time allowed by law he returned to Honolulu and sought re-entry as a returning laborer by virtue of his return permit. He was denied permission to enter by the immigration officials and ordered deported to China upon the ground that "while he had a lawful wife living in China, he married another woman here according to the laws of this Territory and the United States," and was, therefore, "a polygamist and a person who practices polygamy." He appealed to the Secretary of Labor and his appeal was dismissed. He seeks the writ of habeas corpus upon the ground that the ruling of the Secretary of Labor was erroneous. It is unnecessary to state the ground more particularly.

It is not necessary to inquire whether the ruling

of the Secretary of Labor is an affirmance of the decision of the Board of Inquiry at Honolulu or merely a dismissal of petitioner's appeal, nor is it necessary to inquire whether there is consistency between the ruling of the Secretary and that of the Board. It is sufficient to say that the applicant in this case does not show himself entitled to enter, but on the contrary, his own testimony before the Board of Inquiry, a copy of which is attached to the petition, shows that he is not entitled to enter, and, therefore, applicant does not show that he has been unlawfully denied admission. [35]

The applicant's testimony before the Board of Inquiry showed that about seven years before, he married in Hawaii and lived with the woman he married and had two sons and one daughter by her before his departure for his temporary visit aforesaid, and it also showed that at the time he married in this Territory he had a wife then living in China who has since died, and it also showed that he married in China while away on his temporary visit. It can hardly be doubted that his own evidence proved him to be a polygamist and a practicer of polygamy.

In White vs. Chin Fong, 253 U. S. 90, it was not claimed that the applicant came within any of the clauses of the immigration laws excluding aliens. It was claimed that because his "original entry was obtained by fraud" he was not entitled to the benefit of those clauses of the exclusion laws which except certain classes of Chinese from the operation of those laws and permit them to enter and to re-

turn under certain regulations. None of the excluding clauses of the immigration act were invoked in that case. The question here presented is quite different. It is whether a Chinese laborer, though not excluded by the laws which apply to Chinese only, is entitled to re-enter if it be shown that he practiced polygamy in this country before the temporary absence from which he is returning. If he were seeking original admission, even though he were not excluded by the laws applicable to Chinese only, he would be excluded by the polygamy clause of the immigration act. That clause excludes immigrants seeking to re-enter after having previously lived in this country as well as immigrants seeking admission for the first time. Lapina vs. Williams, 232 U. S. 78.

Chinese aliens seeking admission or re-entry as domiciled aliens after returning from temporary absence [36] are subject to the immigration laws regulating the admission and re-entry of all aliens as well as those laws which apply to Chinese only. It is ordered that the writ be discharged.

(Sgd.) HORACE W. VAUGHAN,
Judge U. S. District Court.
Territory of Hawaii.

Dated this 9th day of April, 1921, at Honolulu, T. H. [37]

In the United States District Court, in and for the Territory of Hawaii. No. 165. In the Matter of the Application of Chin Too for a Writ of

Habeas Corpus. Judgment. Entered in Judgment Book, at folio #2433. Filed Apr. 13, 1921. (Sgd.) Wm. L. Rosa, Clerk. S. C. Huber, United States Attorney. N. D. Godbold, Assistant United States Attorney. [38]

In the United States District Court, in and for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Judgment.

Now, to wit, on this 9th day of April, A. D. 1921, the court being in session, Hon. Horace W. Vaughan, a Judge thereof, presiding, the above-entitled matter came on for final determination, the case theretofore having been submitted upon the issues joined by the petition for writ of habeas corpus, the return of respondent to the order to show cause, which said return, by stipulation filed, was made the return to the writ of habeas corpus.

The Court, having considered the evidence as shown by the record made a part of the pleadings, and heard the argument made by Watson & Clemons, attorneys for petitioner, and S. C. Huber, United States Attorney, attorney for respondent, and being duly advised in the premises, finds the issues to be with respondent and the allegations contained in his return to be true.

It is therefore hereby ORDERED, ADJUDGED and DECREED, that the writ of habeas corpus heretofore issued herein be, [39] and it is hereby dis-

missed, and that the petitioner Chin Too be, and hereby is, remanded to the custody of respondent, and that petitioner pay the costs of this action in the sum of $———.

(Sgd.) HORACE W. VAUGHAN,
Judge. [40]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Petition for Appeal. Filed Apr. 20, 1921. (Sgd.) Wm. L. Rosa, Clerk. Watson & Clemons, Attorneys for Petitioner, 417 Kauikelani Building, Honolulu, T. H. [41]

In the United States District Court, in and for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Petition for Appeal.

To the Honorable HORACE W. VAUGHAN, Judge of the Above-entitled Court:

The petitioner, Chin Too, by his attorneys, Watson & Clemons, conceiving himself aggrieved by the order and judgment made and entered on the 9th day of April, A. D. 1921, in the above-entitled matter, does hereby appeal from the said order and judgment to the Circuit Court of Appeals for the Ninth Circuit, and files herewith his assignment of errors intended to be urged upon appeal, and prays that his appeal may be allowed and that a transcript

of the record of all proceedings and papers upon which said order and judgment was made, duly authenticated, may be sent to the Circuit Court of Appeals for the Ninth Circuit of the United States.

Dated this 20th day of April, A. D. 1921.

WATSON & CLEMONS,
Attorneys for said Chin Too.
By (Sgd.) CHAS. F. CLEMONS,

Copy rec'd 4/20/1921.
(Sgd.) S. C. HUBER. [42]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Chin Too for a writ of Habeas Corpus. Assignment of Errors. Filed Apr. 20, '21. (Sgd.) Wm. L. Rosa, Clerk. Watson & Clemons, Attorneys for Petitioner, 417 Kauikeolani Building, Honolulu, T. H. [43]

In the United States District Court, in and for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Assignment of Errors.

The petitioner-appellant says that in the record and proceedings in the above-entitled matter there is manifest error, and that the final record and judgment made and entered in said matter on the 9th day of April, 1921, is erroneous and against the just rights of said petitioner in this, to wit:

I.

That the Court erred in discharging the writ, because it appears by the petition and record herein that the petitioner was entitled to enter the United States.

II.

That the Court erred in holding that, under the evidence, the petitioner was a polygamist.

III.

That the Court erred in holding, under the presumptions of law and burden of proof favoring the petitioner, that he was a polygamist.

IV.

That the Court erred in holding that the respondent has overcome the presumptions of law and burden of proof imposed upon the respondent.

V.

That the Court erred in holding that the petitioner had [44] "married in China while away on his (recent) temporary visit."

VI.

That, there being no ground of excluding the petitioner under the Chinese Exclusion Act, the Court erred in holding, that, so far as any ground of exclusion under the Immigration Act is concerned, the petitioner was charged with any obligation under the law to "show that he has been unlawfully denied admission."

WHEREFORE, by the law of this land the writ of habeas corpus issued herein should have been made absolute and the petitioner have been dis-

charged from custody and permitted to land and remain in the United States of America.

Dated this 20th day of April, A. D. 1921.

WATSON & CLEMONS,
Attorneys for Petitioner, Chin Too.
By (Sgd.) CHAS. F. CLEMONS.

Received a copy of the above assignment of errors.

(Sgd.) S. C. HUBER,
U. S. Atty.,
Attorney for Respondent. [45]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Order Allowing Appeal. Filed Apr. 20, 1921. (Sgd.) Wm. L. Rosa, Clerk. [46]

In the United States District Court, in and for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Order Allowing Appeal.

Upon the application and motion of Watson & Clemons, attorneys for the above-named petitioner:

It is hereby ordered that the petition for appeal heretofore filed herein by Chin Too be and it is hereby granted; and that an appeal to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States, from the final order

and judgment heretofore, on April 9th, 1921, filed and entered herein, be and the same is hereby allowed, and that a transcript of the record of all proceedings and papers upon which such final order and judgment was made, duly certified and authenticated, be transmitted, under the hand and seal of the Clerk of this Court, to the United States Circuit Court of Appeals for the Ninth Judicial Circuit of the United States at San Francisco, in the State of California.

Dated, this 20th day of April, 1921.

(Sgd.) HORACE W. VAUGHAN,
Judge of said Court. [47]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Bond on Appeal. Filed Apr. 11, 1921. (Sgd.) Wm. L. Rosa, Clerk. [48]

In the United States District Court, in and for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, That we, Chin Too, as principal, and Chu Gem and Chu Ming, as sureties, all of Honolulu, City and County of Honolulu, Territory of Hawaii, are held and firmly bound unto the United States of America

in the sum of Five Hundred Dollars ($500.00), lawful money of the United States of America, for the payment of which, well and truly to be made, we bind ourselves and our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such that whereas, a writ of habeas corpus has issued out of the above-entitled court, directed to Richard L. Halsey, Esquire, respondent, directing him to have and produce the body of the said above-named Chin Too before the said United States District Court in and for the District and Territory of Hawaii; and

WHEREAS, the question of the imprisonment and detention of the said Chin Too and his right to discharge under the said writ of habeas corpus has been submitted to the United States District Court in and for the District and Territory of Hawaii, and by that Court decided adversely to the petitioner; and

WHEREAS, the said Chin Too has appealed from said decision and judgment of the District Court of the United States in and for the District and Territory of Hawaii to the United States Circuit [49] Court of Appeals for the Ninth Judicial Circuit of the United States at San Francisco, in the State of California.

NOW, THEREFORE, if the said Chin Too, petitioner-appellant shall prosecute his appeal to effect and shall answer, and pay, all costs to which the respondent-appellee in said appeal shall be entitled, if said petitioner-appellant

fails to make good his said appeal, and if he shall pay all costs further to accrue or be chargeable against him on account of said appeal, and if he shall abide by and perform whatever judgment, decree or/and order may be rendered or made by said Circuit Court of Appeals or on the mandate of said Circuit Court of Appeals, then this obligation shall be void; otherwise the same shall remain in full force and effect.

IN WITNESS WHEREOF the said principal and sureties have *hereuto* set their hands and seals at Honolulu, City and County of Honolulu, this 11th day of April, A. D. 1921.

(Sgd.) CHIN TOO, (Seal)
Principal.
(Sgd.) CHU GEM, (Seal)
(Sgd.) CHU MING, (Seal)
Sureties. [50]

United States of America,
Territory of Hawaii,
City and County of Honolulu,—ss.

Chu Gem and Chu Ming, being first duly sworn, on oath depose and say, each for himself and not one for the other, that they are property owners and residents of said Honolulu, and are each worth more than double the amount of the penalty of the foregoing bond or undertaking over and above their just debts and liabilities and property exempt from execution.

(Sgd.) CHU GEM.
(Sgd.) CHU MING.

Subscribed and sworn to before me this 11th day of April, 1921.

(Sgd.) WM. L. ROSA,
Clerk, United States District Court in and for the District and Territory of Hawaii.

Approved as to form, amount and sufficiency of sureties.

(Sgd.) HORACE W. VAUGHAN,
Judge, United States District Court, District of Hawaii. [51]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Notice of Filing of Bond on Appeal. Filed Apr. 20, '21. (Sgd.) Wm. L. Rosa, Clerk. Watson & Clemons, Attorneys for Petitioner, 417 Kauikeolani Building, Honolulu, T. H. [52]

In the United States District Court, in and for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Notice of Filing of Bond on Appeal.

To RICHARD L. HALSEY, Esq., Immigration Inspector in Charge at the Port of Honolulu, Respondent, and His Attorney, S. C. HUBER, Esq., United States District Attorney:

You are hereby notified that in the matter of the appeal noted herein by said Chin Too from the final judgment and decree, the appellant, the petitioner

above named, has filed in the United States District Court for the Territory of Hawaii, a bond in the sum of five hundred dollars ($500), in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit and the names and residences of the sureties who have executed said bond on appeal in this suit, a copy of which is attached hereto, and made a part hereof, are as follows:

Chu Gem, who resides at 1703 Young Street, in Honolulu, Island of Oahu, said Territory, and does business at 99 N. King Street, said Honolulu (manager of Quong Sam Kee Co.), and whose postoffice address is P. O. Box 985, Honolulu, Hawaii.

Chu Ming, who resides at 1703 Young Street, in Honolulu, Island of Oahu, said Territory, and does business at 99 N. King Street, said Honolulu (Quong Sam Kee Co.), and whose postoffice address is P. O. Box 985, Honolulu, Hawaii.

Honolulu, Hawaii, this 20th day of April, A. D. 1921.

CHIN TOO,
Petitioner-Appellant.
By WATSON & CLEMONS,
His Attorneys.
By (Sgd.) CHAS. F. CLEMONS,

Copy rec'd.

(Sgd.) S. C. HUBER,
U. S. Atty.,
Atty. for Respondent. [53]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Citation on Appeal. [54]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO for a Writ of Habeas Corpus.

Citation on Appeal.

United States of America,—ss.

The President of the United States to RICHARD L. HALSEY, Immigration Inspector in Charge at the Port of Honolulu, Respondent, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to an order allowing an appeal, filed in the clerk's office of the United States District Court for the Territory of Hawaii, wherein Chin Too is appellant, and you, Richard L. Halsey, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court

of the United States of America, this 20th day of April, 1921, and of the Independence of the United States the one hundred and forty-fifth.

J. B. POINDEXTER,
Judge, U. S. District Court.

[Seal] Attest: WM. L. ROSA,
Clerk, U. S. District Court.

Received a copy of the within citation April 20th, 1921.

RICHARD L. HALSEY,
Inspector as Aforesaid,
By S. C. HUBER,
His Attorneys. [55]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Stipulation. Filed Jun. 20, 1921. (Sgd.) Wm. L. Rosa, Clerk. [56]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of CHIN TOO For a Writ of Habeas Corpus.

Stipulation Re Amendment to Petition.

It is hereby stipulated and agreed that the following amendment to the petition asked for and allowed in open court at the hearing herein shall be regarded as inserted in the proper place in said petition, to wit:

II. And the petitioner further alleges that so far as concerns any claim of polygamy based on an alleged or purported marriage to Chang She in China in 1920 (see record hereto annexed, page 1), the second marriage, to Maria Donya in Hawaii thereafter (seven years ago, see said record, page 2), was invalid, null and void, because of the existing prior marriage to Fong She in China, so that at the time of any alleged marriage aforesaid in China in 1920, this petition in any event had a legal right and no legal disability to marry said Chang She; but the petitioner denies said alleged marriage in China in 1920.

CHIN TOO,
By WATSON & CLEMONS,
His Attorneys.
By (Sgd.) C. F. CLEMONS,
(Sgd. S. C. HUBER,
United States Attorney,
Attorney for Respondent.

Approved.

(Sgd.) J. B. POINDEXTER,
Judge. [57]

In the United States District Court for the Territory of Hawaii. In the Matter of the Application of Chin Too for a Writ of Habeas Corpus. Praecipe for Transcript of Record. Filed June 15, '21. (Sgd.) Wm. L. Rosa, Clerk. [58]

In the United States District Court for the Territory of Hawaii.

In the Matter of the Application of Chin Too for a Writ of Habeas Corpus.

Praecipe for Transcript of Record.

To the Clerk of said Court:

You will please prepare transcript of the record in this case to be filed in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, and include therein the following, on file, to wit:

1. Petition for writ of habeas corpus including record of board or special inquiry annexed thereto.
2. Order to show cause thereon.
3. Return of R. L. Halsey, Inspector in Charge, to order to show cause.
4. Writ of habeas corpus.
5. Stipulation that return to order to show cause shall be regarded as return to writ.
6. Opinion.
7. Judgment.
8. Petition for appeal.
9. Assignment of errors.
10. Order allowing appeal.
11. Bond on appeal.
12. Notice of filing bond on appeal.
13. Citation on appeal.
14. Stipulation amending petition.
15. Orders extending time to transmit record on appeal.

16. Minutes of clerk in said case.
17. This praecipe.

Said transcript to be prepared as required by law and [59] the orders of this Court and said Court of Appeals and filed in the office of said Appellate Court at San Francisco.

CHIN TOO,
Petitioner-Appellant.
By WATSON & CLEMONS,
His Attorneys,
By C. F. CLEMONS. [60]

In the District Court of the United States, in and for the District and Territory of Hawaii.

No. 165.

In the Matter of the Application of CHIN TOO For a Writ of Habeas Corpus.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Hawaii,—ss.

I, Wm. L. Rosa, Clerk of the District Court of the United States in and for the District and Territory of Hawaii, do hereby certify that the foregoing pages, numbered from 1 to 60, inclusive, to be a true and complete transcript of the record and proceedings had in said court in the matter of the petition of Chin Too for a writ of habeas corpus, as the same remains of record and on file in my

office, and I further certify that I hereto annex the original citation on appeal and 5 orders extending time to transmit record on appeal in said cause.

I further certify that the cost of the foregoing transcript of record is $19.05 and that said amount has been paid to me.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said court this 4th day of October, A. D. 1921.

[Seal] WM. L. ROSA,
Clerk United States District Court, in and for the District and Territory of Hawaii. (61]

[Endorsed]: No. 3796. United States Circuit Court of Appeals for the Ninth Circuit. Chin Too, Appellant, vs. Richard L. Halsey, as Immigration Inspector in Charge at the Port of Honolulu, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Territory of Hawaii.

Received October 12, 1921.

F. D. MONCKTON,
Clerk,
By Paul P. O'Brien,
Deputy Clerk.

Filed November 2, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

3798

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN THE MATTER OF THE PETITION OF THE PACIFIC TOW BOAT COMPANY, A CORPORATION, OWNER OF THE AMERICAN TUG DEFENDER, FOR A LIMITATION OF LIABILITY.

PACIFIC TOW BOAT COMPANY, A CORPORATION, PETITIONER-APPELLANT,

vs.

DOMINION MILL COMPANY, A CORPORATION, CLAIMANT-APPELLANT.

Apostles on Appeal

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

IN THE MATTER OF THE PETITION OF THE PACIFIC TOW BOAT COMPANY, A CORPORATION, OWNER OF THE AMERICAN TUG DEFENDER, FOR A LIMITATION OF LIABILITY.

PACIFIC TOW BOAT COMPANY, A CORPORATION, PETITIONER-APPELLANT,

vs.

DOMINION MILL COMPANY, A CORPORATION, CLAIMANT-APPELLANT.

Apostles on Appeal

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

INDEX.

STATEMENT.

Time of commencement of suit: April 5, 1920.

Names of the parties to the suit:

Pacific Tow Boat Company, a corporation, petitioner-appellant.

Dominion Mill Company, a corporation, claimant-appellee.

Names and addresses of Counsel:

William H. Gorham, 652 Colman Building, Seattle, Washington, for petitioner-appellant;

John E. Ryan,

Grover E. Desmond,

608 Pantages Building, Seattle, Washington, for claimant-appellee.

Dates of filing of pleading:

Petition, filed April 5, 1920.

Answer, filed October 4, 1920.

Claim, filed October 2, 1920.

Appraisal of Tug DEFENDER and freight pending under order of court; confirmation of appraisal by the court.

Stipulation with an approved corporate surety for payment of appraised value of Tug DEFENDER and freight pending, into court, with interest at the rate of six per cent per annum from date of said stipulation, and costs, approved by the court.

Monition against all persons claiming damages, etc., issued by order of the court, with return of the U. S. Marshal thereon.

Order of court restraining further prosecution of any and all suits against the petitioner Pacific Tow Boat Company, a corporation, in respect to such claims.

Stipulation as to amount of recovery.

Order of reference.

Time of the trial before the Referee: March 16-17, June 22-24, 1921.

Submission of case on report of Referee: June 30, 1921.

The name of the judge hearing said matter was the Honorable Jeremiah Neterer, Judge of the United States Dis-

trict Court for the Western District of Washington, Northern Division.

The date of the entry of the final decree: August 2, 1921.

The date when the notice of appeal was filed: Aug. 2, 1921.

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.
In Admiralty—No. 5207.

In the Matter of the Petition of the Pacific Towboat Company, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

PETITION FOR LIMITATION OF LIABILITY.

To the Honorable Jeremiah Neterer, Judge of the above entitled court, sitting in admiralty:

The petition of the Pacific Towboat Company, owner of the American Tug DEFENDER, in a cause of limitation of liability, civil and maritime, respectfully shows:

I.

That at all times herein mentioned the petitioner, Pacific Towboat Company, was and now is a corporation organized and existing under the laws of the State of Washington and on the 10th day of December, 1918, and at all times thereafter was and now is sole owner of the American Tug *Defender.*

II.

That in the month of December, 1918, and prior to the 11th day of said month the libellant is informed, verily believes and states the fact to be, that Canyon Lumber Company, a corporation, of Everett, Washington, contracted with the Dominion Mill Company, a corporation of the State of California, doing business in the State of Washington, to sell and deliver to said Dominion Mill Company a cargo of about two hundred ninety-four thousand (294,000) feet of lumber F. O. B. scow *Claire,* said scow then being owned by said Canyon Lumber Company, at the latter's mill on the Snohomish river in the City of Everett, State of Washington, and to charter to said Dominion Mill Company the said scow and the use of the whole thereof for the purpose of transporting said lumber from said mill on the Snohomish river

to the port of Port Blakely, Washington, and that pursuant to said contract said Canyon Lumber Company thereafter and prior to libellant's taking said scow in tow as hereinafter stated delivered to the Dominion Mill Company on board said scow at said mill on the Snohomish river said cargo of lumber.

III.

That on or about December 11th, 1918, said Dominion Mill Company requested libellant to tow said scow with said cargo from said mill on the Snohomish river to the mill at Port Blakely, Washington, and pursuant to said request on said last named day at about the hour of 10 o'clock A. M. the American Tug *Defender,* owned and operated by libellant, being then and there and at all times thereafter herein mentioned in all respects properly tackled, apparelled, supplied, manned and equipped with a full complement of officers and seamen aboard, and being in all respects tight, staunch, strong and seaworthy and with sufficient power to perform said towage service, took said scow with said cargo of lumber on board thereof in tow bound for said port of Port Blakely.

IV.

That said tug proceeded with said scow and cargo in tow to Priest Point at the mouth of said Snohomish river and laid there one tide and with a rising glass and smooth sea at about the hour of 11 o'clock P. M. of said 11th day of December, 1918, proceeded from Priest Point for Port Blakely.

V.

That at about the hour of 3 o'clock A. M. on the following morning said tug with said scow and cargo in tow, being then off the town of Edmonds, State of Washington, a light southeast wind and but little sea prevailing, the officers in charge of the navigation of said tug looking back at the scow in tow ascertained that her lights were out and thereupon, upon shortening the hawser, found that the scow had dumped the larger part of her cargo into the sea from some cause unknown to them or any of them or to libellant.

VI.

That the master of said tug immediately went ashore near Point Meadows, Washington, to advise libellant of said loss of cargo and to request assistance, and thereupon, upon libellant's instructions, tugs were immediately dispatched to

the assistance of said tug *Defender,* when said scow, then submerged to her deck, was towed to Port Blakely with a portion of said cargo, to-wit:_____feet board measure of lumber still on her in a damaged condition, arriving at Port Blakely on the 12th day of December, 1918.

VII.

That a large portion, to,wit:_____feet of said lumber constituting said cargo, damaged as aforesaid, was picked up by the libellant in a damaged condition and towed to Everett and there impounded and said Dominion Mill Company notified by libellant of the same; and about_____feet of said lumber was not recovered at all but became totally lost.

VIII.

That the said tug *Defender* is now lying at Ballard in the City of Seattle and libellant avers that the value of said tug at the time of said towage service and upon the completion of the same at Port Blakely did not exceed the sum of $2,000.00, and that the then pending towage was the sum of $75.00, which amount was the regular tariff rate for such service.

IX.

That the dumping of said cargo as aforesaid and the consequent damage and loss of said lumber as aforesaid was in no wise caused by fault or negligence on the part of said tug, her master, officers or crew, or this libellant, but solely by reasons unknown to libellant.

X.

That said dumping of said cargo aforesaid and the loss, damage and injury above referred to were done, occasioned and incurred without fault on the part of petitioner and without its privity or knowledge.

XI.

That the said Dominion Mill Company, claiming to have suffered loss and been damaged by reason of the dumping of said cargo of lumber as aforesaid, through the carelessness and negligence of the defendant, has brought suit against your petitioner in the Superior Court of the State of Washington, in and for the County of King, to recover damages therefor in the sum of $7,446.18, which suit is still pending and undetermined and in which suit your petitioner has

appeared; that the amount of damage claimed by said Dominion Mill Company in said suit far exceeds the amount of the value of said tug *Defender* either now or on said December 12th, 1918, and including her freight pending in the sum of $75.00, as aforesaid.

XII.

That petitioner desires to claim the benefit of the provisions of Sections 4283, 4284 and 4285 of the Revised Statutes of the United States, and the acts amendatory thereof and supplemental thereto, and in this proceeding by reason of the facts and circumstances hereinbefore set forth to contest its liability, the liability of said tug *Defender* to any extent whatever for any and all loss, destruction, damage and injury caused by and resulting from the operation and management of said tug *Defender* by your petitioner, its servants and agents, including the officers of said tug or any of them, on said 11th and 12th days of December, 1918.

XIII.

That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

WHEREFORE your petitioner prays that according to the course of this honorable court in causes of admiralty and maritime jurisdiction, this court will cause due appraisement to be had and the amount of the value of petitioner's interest in said tug *Defender* at the close of said 12th day of December, 1918, and of the value of her freight then pending, and will make an order for the payment of the same into this court or for the giving of a stipulation providing for the payment thereof as ordered by this court; and that this court will issue a monition to all persons claiming damages for any and all losses, destruction, damage or injury caused by or resulting from the operation and management of said tug by your petitioner on said 11th and 12th days of December, 1918, against said petitioner or against said tug, citing them to appear before a commissioner to be named by the court and make due proof of their respective claims at or before a time certain to be fixed by said writ; they also to appear and answer on oath the allegations of the petition according to law and the practice of this court; and that this court will issue its injunction restraining the prosecution of the aforesaid suit by said Dominion Mill Company and the commencement and prosecution hereafter of any and all suits, causes or legal proceedings against said petitioner or against

said launch in respect of any claim or claims arising out of the management or operation of said tug on said 11th and 12th days of December, 1918, and that the court in this proceeding will adjudge the petitioner and the tug *Defender* are not or either of them is liable to any extent or at all for said loss, damage or injury; or, if it shall adjudge said petitioner or said tug or either of them are liable, then that the liability of the petitioner be limited to the amount of the value of its interest in said tug at the close of said 12th day of December, 1918, and said freight then pending, and that the moneys paid or secured to be paid as aforesaid be divided pro rata among such claimants as may duly prove their claims before the commissioner aforesaid, saving to all parties any priority to which they may be legally entitled; and that petitioner may have such other and further relief in the premises as may be just.

PACIFIC TOWBOAT COMPANY,
Petitioner.

WILLIAM H. GORHAM,
Proctor for Petitioner.

STATE OF WASHINGTON, COUNTY OF KING—SS.

F. M. DUGGAN, being first duly sworn on oath deposes and says: That he is the President of the Pacific Towboat Company, a corporation, petitioner in the above entitled action; that he has heard the foregoing petition read, knows the contents thereof and believes the same to be true.

F. M. DUGGAN.

Subscribed and sworn to before me this 2nd day of April, 1920.

R. C. HAZEN,
Notary Public in and for the State of Washington, residing at Seattle, Washington.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, April 5, 1920.

F. M. HARSHBERGER, *Clerk.*
S. E. LEITCH, *Deputy.*

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the Pacific Towboat Company, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

ORDER APPOINTING APPRAISERS.

Upon reading the libel and petition heretofore filed herein by the Pacific Towboat Company, owner of the Tug *Defender,* praying for a limitation of its liability and for an appraisal of the amount of the value of its interest in said tug and her freight pending at the close of the 12th day of December, 1918, and it appearing to the court that due service of a notice of a monition for the appointment of appraisers in the above entitled matter and of bringing the same on for hearing at this time, together with a copy of the petition heretofore filed herein has been made upon the Dominion Mill Company, a corporation, and Messrs. Ryan & Desmond, its attorneys;

IT IS ORDERED, That Captain John L. Anderson, Captain A. A. Paysse and Frank Moran be and they are hereby appointed appraisers to appraise the amount of the value of the interest of petitioner in said tug and her freight pending at the close of the 12th day of December, 1918, which when ascertained be paid into the registry of this court by petitioner to abide the event of this proceeding, or at the option of said petitioner that it may file a stipulation in such appraised amount with interest from said 12th day of December, 1918, providing for the payment of such amount as ordered by the court, not to exceed such appraised amount and interest, and with sureties to be approved by this court.

Dated Seattle, Washington, April 13, 1920.

Jeremiah Neterer, *Judge.*

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, April 12, 1920.

F. M. Harshberger, *Clerk.*
S. E. Leitch, *Deputy.*

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the Pacific Towboat Company, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

APPRAISERS' REPORT.

To the Honorable Jeremiah Neterer, Judge of the above entitled court:

The undersigned having been duly appointed appraisers and sworn as such to appraise the value of the interest of the Pacific Towboat Company, owner of the American Tug *Defender,* in said Tug and her freight pending at the close of the 12th day of December, 1918, do hereby report that they have examined and appraised the value of the interest of said petitioner in said Tug and her freight pending, and do find as follows:

That the present value of said Tug is the sum of $2,500.00; that the value of said Tug on the 12th day of December, 1918, did not exceed the sum of $2,800.00; that the amount of freight pending on account of said Tug at the close of the 12th day of December, 1918, for towage service rendered the Dominion Mill Company on December 11th and 12th, 1918, is the sum of $75.00; that the value of the interest of petitioner in said Tug at the close of the 12th day of December, 1918, was the sum of $_____.

All of which is respectfully submitted.

Dated Seattle, Washington, June 2, 1920.

Frank Moran,
J. L. Anderson,
A. A. Paysse,
Appraisers.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, June 3, 1920.

F. M. Harshberger, *Clerk.*
S. E. Leitch, *Deputy.*

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

No. 5207.

In the Matter of the Petition of the PACIFIC TOWBOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

This cause coming on to be heard on the report of the appraisers heretofore filed herein and on the motion of the petitioner for an order confirming said report, counsel for petitioner and Messrs. Ryan & Desmond, attorneys for the Dominion Mill Company, a corporation, being present in court;

It appearing to the court that due notice of the hearing of this motion has been given to the Dominion Mill Company, a corporation, named in the petition and libel herein, by service on their attorneys of record named in said petition;

And it appearing to the court that the value of the Tug *Defender* and of her freight pending at the close of the 12th day of December, 1918, and of petitioner's interest therein at the close of said last named date was the sum of $2,875.00;

The court being fully advised in the premises,

It is now ORDERED that the report of said appraisers be and it is hereby approved and confirmed in all things;

It is further ORDERED that the value of the interest of petitioner in the Tug *Defender* and her freight pending at the close of the 12th day of December, 1918, be and the same is hereby fixed at $2,875.00.

That said appraisers be and they are hereby discharged from further service herein.

Dated Seattle, Washington, June 14, 1920.

JEREMIAH NETERER, *Judge.*

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, June 14, 1920.

F. M. HARSHBERGER, *Clerk.*
S. E. LEITCH, *Deputy.*

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

No. 5207.

In the Matter of the Petition of the PACIFIC TOWBOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

STIPULATION TO PAY APPRAISED VALUE.

WHEREAS, a libel and petition have been heretofore filed herein by the Pacific Towboat Company as owner of the American Tug *Defender* praying for a limitation of liability for reasons and causes in said libel and petition mentioned, and for an appraisal of said Tug and her freight pending, and of the value of petitioner's interest therein, and due appraisal has been made under the direction of the court of the amount of the value of the interest of petitioner therein at the close of the 12th day of December, 1918, and the same having been appraised at the sum of $2,875.00, and said appraisal having been confirmed by the court and said interest of said petitioner therein by an order of court herein fixed at the sum of $2,875.00.

The said petitioner, Pacific Towboat Company, a corporation, as principal, and Fidelity & Deposit Company of Maryland, its surety, the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of said petitioner or its surety execution may issue against their goods, chattels and lands for the sum of $5,750.00 with interest from the 12th day of December, 1918;

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of $5,750.00, together with interest thereon from the 12th day of December, 1918, conditioned that the above named petitioner shall pay into the registry of said court, for the benefit of whom it may concern, the said sum of $2,875.00, the appraised amount as specified with interest thereon from the 12th day of December, 1918, unless otherwise ordered by the court or upon appeal by the appellate court.

Dated Seattle, Washington, June 14, 1920.

PACIFIC TOWBOAT COMPANY,
By A. L. MCNEALY, *Its Manager.*

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.
J. BAIRD, *Agent.*
J. A. CATHCART, *Attorney-in-Fact.*

I approve of the sufficiency of the sureties to the within bond.

Dated Seattle, Washington, June 15, 1920.

JEREMIAH NETERER, *Judge.*

Approved as to form and surety.

RYAN & DESMOND.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, June 15, 1920.

F. M. HARSHBERGER, *Clerk.*
S. E. LEITCH, *Deputy.*

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the PACIFIC TOWBOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

ORDER FOR MONITION AND RESTRAINING ORDER.

On reading the petition herein of the above named Pacific Towboat Company praying for limitation of its liability as owner of the American Tug *Defender* by reason of certain loss of and damage to, on December 11 and 12, 1918, a cargo of lumber laden on the scow *Claire,* in tow of said tug;

It appearing that an action has heretofore on March 30, 1920, been brought in the Superior Court of the State of Washington for King County by the Dominion Mill Company, a corporation, alleged owner of said cargo of lumber, against said Pacific Towboat Company for said loss and damage, for the sum of $7,446.18;

And an order having heretofore been entered herein whereby Frank Moran, J. V. Anderson and A. A. Paysse were appointed appraisers to ascertain and appraise and report to this court the value of the interest of the petitioner in said Tug and in her freight pending for the voyage in the petition mentioned;

And due notice of the proceedings to appraise the said Tug having been given and said appraisal having been duly had and said appraisers having duly filed their report herein wherein they find the value of the interest of the petitioner in said Tug and her pending freight to be the sum of

$2,875.00, and no exceptions to said report having been filed and said report having been confirmed and said petitioner having filed in the office of the clerk of this court a stipulation in the sum of $5,750.00 with the Fidelity and Deposit Company of Maryland, as surety, conditioned as required by law, which stipulation has been duly approved by this court;

Now, on motion of proctor for petitioner,

It is ORDERED, that a monition issue out of and under the seal of this court against all persons claiming damages for any and all loss, destruction, damage, or injury caused by or resulting from the casualty set forth in said petition herein, citing them and each of them to appear before this court and make due proof of their respective claims on or before the 4th day of October, 1920, at 11 o'clock A. M. of that day, and A. C. Bowman, Esq., is hereby appointed commissioner before whom proof of all claims which may be presented pursuant to said monition shall be made, subject to the rights of any person or persons interested to controvert or question the same. And it is further

ORDERED, that public notice of said monition be given by publication thereof in the Journal of Commerce, a newspaper published in the City of Seattle, once a day for fourteen days and thereafter once a week until the return day of said monition, and that the first publication of said monition be at least three months before said return day. And it is further

ORDERED, that a copy of said monition and of this order be served at least thirty days before the return day of said monition upon Messrs. Ryan & Desmond, attorneys for said Dominion Mill Company in said action in said Superior Court; and it is further

ORDERED, that the further prosecution of said action in said Superior Court and the prosecution of any and all other suits, actions and proceedings of any nature or description against said petitioner or against said Tug in respect of any claim for damages for loss, destruction, damage or injury on account of the casualty on the voyage of said Tug on December 11 and 12, 1918, set forth in said petition herein, be and the same hereby is restrained; and it is further

ORDERED, that the service of this order as a restraining order be made within the Western District of Washington in the usual manner and in any other District of the United States by delivery by the Marshal of the United States for such District, of a certified copy of this order to the person

or persons to be restrained, or their attorneys or proctors acting in that behalf.

Dated Seattle, June 15, 1920.

JEREMIAH NETERER, *Judge.*

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, June 15, 1920.

F. M. HARSHBERGER, *Clerk.*
S. E. LEITCH, *Deputy.*

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the PACIFIC TOWBOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

MONITION.

The President of the United States of America, To the Marshal of the United States for the Western District of Washington:

WHEREAS, a libel and petition hath been filed in the District Court of the United States for the Western District of Washington, Northern Division, on the 5th day of April, 1920, by the Pacific Towboat Company, a corporation, owner of the American Tug *Defender,* praying for a limitation of its liability concerning the loss, damage or injury occasioned by or resulting from the operation or management of said Tug by petitioner on the 11th and 12th days of December, 1918, for the reasons and causes in said libel and petition mentioned, and praying a monition of the court in that behalf be issued and that all persons claiming damage for any such loss, damage or injury may be thereby cited to appear before the court and make due proof of their respective claims, and all proceedings being had, if it shall appear that said petitioner is not liable for any loss, damage or injury and it may be so finally decreed by this court;

AND WHEREAS, the value of the interest of said petitioner in said Tug and her freight pending at the close of the 12th day of December, 1918, has been appraised in the sum of $2,875.00, and said appraisal confirmed by an order of said court;

AND WHEREAS, a stipulation in the amount of said

appraised value with interest from December 12th, 1918, with a surety approved by the court has been filed herein by said petitioner and the court has ordered a monition to issue against all persons claiming damage by any loss, damage or injury against said petitioner or against said Tug *Defender* caused by or resulting from the operation and management of said Tug by petitioner on the 11th and 12th days of December, 1918, citing them to appear and make due proof of their respective claims;

You are therefore COMMANDED to cite all persons claiming damages against said petitioner or against said American Tug *Defender* for any loss, damage or injury caused by or resulting from the operation and management of said Tug by petitioner on December 11th and 12th, 1918, to appear before said court and make due proof of their respective claims before A C. Bowman, Esq., Commissioner of the United States District Court for the Western District of Washington, Northern Division, at his office, room 536 Central Building, in the City of Seattle, State of Washington, before the 4th day of October, 1920, at 11 o'clock, A. M.; and you are also Commanded to cite such claimants to appear and answer the allegations of the libel and petition herein on or before the last named date or within such further time as the court may grant, to have and receive such relief as may be due.

And for what you have done in the premises do you make return to this court together with this Writ.

WITNESS the Honorable Jeremiah Neterer, Judge of the United States District Court for the Western District of Washington, this 15th day of June, 1920, and the 144th year of the Independence of the United States of America.

F. M. Harshberger, *Clerk.*
S. E. Leitch, *Deputy.*

RETURN ON SERVICE OF WRIT.

United States of America, Western District
of Washington—ss.

I hereby certify and return that I executed the annexed monition by handing to and leaving a true and correct copy thereof with Ryan & Desmond, as ordered by W. H. Gorham, attorney for petitioner, at Seattle, Washington, in said District, on the 15th day of June, 1920.

John M. Boyle, *U. S. Marshal.*
By A. Rook, *Deputy.*

In obedience to within writ I did advertise the petition for limitation of liability Tug *Defender* as commanded.

JOHN M. BOYLE, *U. S. Marshal.*
W. E. THEODORE, *Deputy.*

Seattle, Wash., Sept. 20, 1920.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, September 20, 1920.

F. M. HARSHBERGER, *Clerk.*
S. E. LEITCH, *Deputy.*

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

No. 5207.

In the Matter of the Petition of the PACIFIC TOWBOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

To the Honorable Judges of the Above Entitled Court:

I herewith return the claim filed by the Dominion Mill Company, pursuant to the order of the court in the above entitled cause, to-wit:

Claim in the sum of $7,446.18, filed with me October 2nd, 1920.

Respectfully submitted,
A. C. BOWMAN,
U. S. Commissioner.

October 26, 1920.

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the PACIFIC TOWBOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

CLAIM OF DOMINION MILL COMPANY FOR DAMAGES.

Comes now the DOMINION MILL COMPANY, a corporation, in the above matter, and, in pursuance to the monition herein issued, presents and files with A. C. Bowman, Esq., Commissioner of the United States District Court for the Western District of Washington, Northern Division, its claim

and makes claim against the above named Pacific Towboat Company, a corporation, as follows:

I.

That at all times hereinafter mentioned the Dominion Mill Company was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and is authorized to and does do business within the State of Washington, and has paid all license fees now due the State of Washington.

II.

That the petitioner, the Pacific Towboat Company, is a corporation organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Seattle, King County, its business consisting of operating tug boats for hire for towing of scows, barges and other craft upon the navigable waters within, and bordering upon the shores, of the State of Washington.

III.

That the manufacturing plant and shipping port of the claimant is at Port Blakely, on Bainbridge Island, in King County, Washington, and a material part of the business of the claimant is that of selling lumber for export trade.

IV.

That heretofore and on or about the 12th day of December, 1918, the claimant had purchased a shipment of lumber for export trade, delivery of which was to be made on a scow at the plant of the Canyon Lumber Company on the Snohomish River, in Snohomish County, Washington.

V.

That the claimant employed the petitioner to tow the said scow of lumber to claimant's mill at Port Blakely, Washington.

VI.

That said petitioner and its employees, the master and crew, of the Tug *Defender,* which Tug was owned by the petitioner and assigned for the towing of said lumber, carelessly and negligently failed and neglected to use reasonable care in the handling and towing thereof in that while the

said scow was being towed down the Snohomish River by the said Tug, they allowed the scow to come in contact with the bank of the river, thereby cracking, straining and breaking the same and causing it to leak, and, notwithstanding the condition of such scow, which would have been disclosed by examination, they failed so to examine the same and proceeded into the waters of Puget Sound with the same in such damaged condition when the weather was unsafe for towing, and they failed and neglected to use reasonable care to keep said scow, while en route from the Snohomish River to the plant of the company, free from water, but allowed the same to become swamped in said Puget Sound and a large part of its cargo of lumber to be dumped overboard into the water; that by reason thereof 248,206 feet of said lumber was lost and damaged, which lumber was of the reasonable value of Thirty-two ($32.00) Dollars per thousand, and by reason thereof this claimant, the Dominion Mill Company, has been damaged in the sum of Seven Thousand Four Hundred Forty-six and 18/100 ($7,446.18) Dollars; that said collision was caused by and contributed to by the officers, agents and servants of the said Tug *Defender.*

WHEREFORE, this claimant, Dominion Mill Company, presents its claim against the said Pacific Towboat Company and the American Tug *Defender,* in the sum of Seven Thousand Four Hundred Forty-six and 18/100 ($7,446.18) Dollars.

RYAN & DESMOND,
Proctors for Dominion Mill Company.

State of Washington, County of King—ss.

WILLIAM MITCHELL, being first duly sworn, on oath states: That he is manager of the above named claimant, Dominion Mill Company, a corporation, and the only officer thereof within the State of Washington and the above district; that he has read the foregoing claim, knows the contents thereof, and believes the same to be true.

WILLIAM MITCHELL.

Subscribed and sworn to before me this 1st day of October, A. D. 1920.

GROVER E. DESMOND,
Notary Public in and for the State of Washington, residing at Seattle.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, October 26, 1920.

F. M. HARSHBERGER, *Clerk.*
S. E. LEITCH, *Deputy.*

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

No. 5207.

In the Matter of the Petition of the Pacific Towboat Company, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

ANSWER TO PETITION FOR LIMITATION OF LIABILITY.

To the District Court of the United States for the Western District of Washington:

Comes now Dominion Mill Company, a corporation, claimant in the above entitled matter, having filed its Claim with A. C. Bowman, Esq., Commissioner of the United States District Court for the Western District of Washington, Northern Division, and, for answer to the Petition for limitation of liability of Pacific Towboat Company, a corporation, owner of the American Tug *Defender*, admits, denies and alleges, as follows:

I.

For answer to Paragraph I. of said petition, this Claimant admits the same.

II.

For answer to Paragraph II. of said Petition, this Claimant admits the same.

III.

For answer to Paragraph III. of said Petition, this Claimant denies that the American Tug *Defender* was, at the time therein mentioned, properly tackled, apparalled, supplied, manned and equipped with a full complement of officers and seamen aboard, and being in all respects tight, staunch, strong and seaworthy and with sufficient power to perform said towage service, and admits each and every other allegation and averment therein contained.

IV.

For answer to Paragraph IV. of said Petition, this Claimant admits that the tug proceeded with said scow and cargo in tow to Priest Point at the mouth of the Snohomish River and then proceeded on the 11th day of December, 1918, from Priest Point for Port Blakely, and denies each and every allegation and averment therein contained.

V.

For answer to Paragraph V. of said Petition, this Claimant admits that the scow had dumped the larger part of her cargo into the sea and denies each and every other allegation and averment therein contained.

VI.

For answer to Paragraph VI. of said Petition, this Claimant admits that the scow was submerged to her deck and was towed to Port Blakely in a damaged condition on the 12th day of December, 1918, and it alleges that it has no knowledge or information sufficient to form a belief as to the truth or falsity of the other allegations therein contained, and therefore denies the same.

VII.

For answer to Paragraph VII. of said Petition, this Claimant denies the same.

VIII.

For answer to Paragraph VIII. of said Petition, this Claimant alleges that it has no knowledge or information sufficient to form a belief as to the truth or falsity of the allegations therein contained and therefore denies the same.

IX.

For answer to Paragraph IX. of said Petition, this Claimant denies the same.

X.

For answer to Paragraph X. of said Petition, this Claimant denies the same.

XI.

For answer to Paragraph XI. of said Petition, this Claimant admits the same.

XII.

For answer to Paragraph XII. of said petition, this Claimant denies the same.

XIII.

For answer to Paragraph XIII. of said Petition, this Claimant denies the same.

Further answering said Petition and in resistance to the same, this Claimant alleges:

I.

That at all times hereinafter mentioned the Dominion Mill Company was and now is a corporation organized and existing under and by virtue of the laws of the State of California, and is authorized to and does do business within the State of Washington, and has paid all license fees now due the State of Washington.

II.

That the petitioner, the Pacific Towboat Company, is a corporation, organized and existing under and by virtue of the laws of the State of Washington, with its principal place of business at Seattle, King County, its business consisting of operating tug boats for hire for towing of scows, barges and other craft upon the navigable waters within, and bordering upon the shores of, the State of Washington.

III.

That the manufacturing plant and shipping port of the claimant is at Port Blakely, on Bainbridge Island, in Kitsap County, Washington, and a material part of the business of the claimant is that of selling lumber for export trade.

IV.

That heretofore and on or about the 12th day of December, 1918, the claimant had purchased a shipment of lumber for export trade, delivery of which was to be made on a scow at the plant of the Canyon Lumber Company on the Snohomish River, in Snohomish County, Washington.

V.

That the claimant employed the petitioner to tow the said scow of lumber to claimant's mill at Port Blakely, Washington.

VI.

That said petitioner and its employees, the master and crew, of the tug *Defender,* which tug was owned by the petitioner and assigned for the towing of said lumber, carelessly and negligently failed and neglected to use reasonable care in the handling and towing thereof, in that, while the said scow was being towed down the Snohomish River by the said tug, they allowed the scow to come in contact with the bank of the river, thereby cracking, straining and break-

ing the same and causing it to leak, and, notwithstanding the condition of such scow, which would have been disclosed by examination, they failed so to examine the same and proceeded into the waters of Puget Sound with the same in such damaged condition when the weather was unsafe for towing, and they failed and neglected to use reasonable care to keep said scow, while en route from the Snohomish River to the plant of the company, free from water, but allowed the same to become swamped in said Puget Sound and a large part of its cargo of lumber to be dumped overboard into the water; that by reason thereof, 248,206 feet of said lumber was lost and damaged, which lumber was of the reasonable value of Thirty-two ($32.00) Dollars per thousand, and by reason thereof this claimant, the Dominion Mill Company, has been damaged in the sum of Seven Thousand Four Hundred Forty-six and 18/100 ($7,446.18) Dollars; that said collision was caused and contributed to by the officers, agents and servants of the said tug *Defender*.

WHEREFORE, this Claimant prays that this Honorable Court be pleased to pronounce against the Petition aforesaid and decree the payment of this Claimant's claim herein in the amount of Seven Thousand Four Hundred Forty-six and 18/100 ($7,446.18) Dollars, and to condemn the petitioner in costs, and that this petitioner have such other and further relief in the premises as in law and justice it might be entitled to receive.

RYAN & DESMOND,
Proctors for Claimant.

State of Washington, County of King.—ss.

WILLIAM MITCHELL, being first duly sworn, on oath, states: That he is Manager of the above named Claimant, Dominion Mill Company, a corporation, and the only officer thereof within the State of Washington and the above district; that he has read the foregoing claim, knows the contents thereof and believes the same to be true.

WM. W. MITCHELL.

Subscribed and sworn to before me this 1st day of October, A. D. 1920.

GROVER E. DESMOND,
Notary Public in and for the State of Washington, residing at Seattle.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, October 4, 1920.

F. M. HARSHBERGER, *Clerk.*
S. E. LEITCH, *Deputy.*

IN THE UNITED STATES DISTRICT COURT,
WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

In Admiralty—No. 5207.

In the matter of the Petition of THE PACIFIC TOWBOAT COMPANY, a Corporation, Owner of the American Tug DEFENDER, for Limitation of Liability.

STIPULATION.

IT IS HEREBY STIPULATED by and between the parties hereto, through their respective attorneys undersigned, that the above entitled matter may be stricken from the trial calendar of the above entitled Court and that an Order may be entered referring said matter for proof on the merits to A. C. BOWMAN, ESQ., United States Commissioner of said Court, and that the hearing before said United States Commissioner shall commence at 10 o'clock a. m. on the 16th day of March, 1921, and shall continue from day to day thereafter, Sundays and Holidays excluded, until the end thereof.

IT IS FURTHER STIPULATED that the Dominion Mill Company, Claimant in the above entitled matter, waives proof upon the part of Petitioner, the Pacific Towboat Company, of the allegations of the Petition for Limitation of Liability, and that, in any event, notwithstanding proof on the hearing before said Commissioner, no Decree, if any, shall be entered in said matter in favor of said Claimant and against the Pacific Towboat Company in excess of Twenty-seven Hundred ($2700.00) Dollars and Costs.

Dated at Seattle, Washington, this 7th day of March, 1921.

WILLIAM H. GORHAM,
Attorney for Petitioner.

RYAN & DESMOND,
Attorneys for Claimant.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, March 9, 1921.

F. M. HARSHBERGER, *Clerk.*
S. E. LEITCH, *Deputy.*

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of Pacific Tow Boat Company, a Corporation, Owner of the American Tug DEFENDER, for a Limitation of Liability.

ORDER OF REFERENCE.

Upon reading the stipulation between the parties in the above entitled Matter, filed in said Matter on March 9th, 1921,

It is Ordered that said Matter be referred to A. C. Bowman, Esq., United States Commissioner of the above entitled Court, to take the testimony therein and report the same to this Court.

Dated, March 10, 1921.

Jeremiah Neterer, *Judge.*

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, March 10, 1921.

F. M. Harshberger, *Clerk.*
S. E. Leitch, *Deputy.*

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

No. 5207.

In the Matter of the Petition of The Pacific Towboat Company, a Corporation, Owner of the American Tug DE-

FENDER, for Limitation of Liability, *Petitioner.*
Dominion Mill Company, a Corporation, *Claimant.*

TESTIMONY REPORTED BY COMMISSIONER.

To the Honorable Judges of the Above Entitled Court:

Pursuant to the order of reference herein, and on this 16th day of March, 1921, the parties appeared before me, the Petitioner being represented by Mr. William H. Gorham, and the Claimant being represented by Messrs. Ryan & Desmond, the following proceedings were had and testimony offered:

MR. GORHAM: In as much as the Claimant, Dominion Mill Company, has stipulated waiving proof on the part of the Petitioner, of the allegations of the Petition for Limitation of Liability; and, that in any event, nowithstanding proof on the hearing before said Commissioner, no decree, if any, shall be entered in said matter in favor of said Claimant and against the Pacific Towboat Company in excess of $2700.00 and costs.

That it is now agreed that the petition of the Petitioner shall stand as an answer to the answer of the Claimant; and that the allegations of the answer in the further answer and defense, shall be deemed denied where not denied in said Petition.

MR. RYAN: That is right.

MR. GORHAM: We admit the Dominion Mill Company is a corporation.

MR. RYAN: We admit the Pacific Towboat Company is a corporation. Will you admit the employing of the Pacific Towboat Company by the Dominion Mill Company in this matter?

MR. GORHAM: We admit it in the Petition. If you will look at the end of the second paragraph of the Petition, you will see that is admitted in your pleading.

MR. RYAN: That is right.

MR. GORHAM: Will you admit there was 294,000 feet loaded on the scow?

MR. RYAN: Let it be stipulated that there was 294,-228 feet of lumber loaded on the scow.

MR. GORHAM: Yes.

MR. RYAN: And the question of what was delivered at Port Blakely we will have to prove.

CLAIMANT'S TESTIMONY.

JOHN S. CLARK, a witness called on behalf of Claimant, being duly sworn, testified as follows:

BY MR. RYAN:

Q. Where do you reside?
A. Port Blakely.
Q. What is your business?
A. Lumber inspector.

Q. Did you inspect a scow of lumber, or cause the same to be inspected under your supervision, which was delivered on the scow *Claire* to the Dominion Mill Company at Port Blakely, Washington, on or about the 12th of December, 1918?

A. Yes sir.

Q. What quantity of lumber was on that scow at that time?

A. I could not tell you without looking over the file.

(Examines memoranda.) Between 40,000 and 50,000 feet, from the tally sheet that is on file.

MR. RYAN: In the other case the testimony was 46,220 feet.

MR. GORHAM: That is in another case.

Q. You say between forty and fifty thousand?

A. Yes, to the best of my recollection.

MR. GORHAM: We will consider whether we will require to produce the record, and let you know.

MR. RYAN: We will bring it if you desire it.

Q. You made no examination of the scow, did you, Mr. Clark?

A. No, not at the time.

Q. Did you make it later?

A. I saw it on the beach, after.

Q. What condition was the scow in when you examined it?

A. At the time I saw it it was on the beach; they were draining the water out of it; and the Jap held a lantern down through the hatchway and you could see the light shining through the crack.

Q. Where was this crack on the scow?

A. It was on the corner.

Q. How far from the top?

A. I think it was in the top seam.

Q. How large was the crack?

A. It was two or three feet long; I would not say how long. I know I shoved my ruler through it.

Q. You shoved a ruler through it?

A. Yes. It was night and I could not measure it.

Q. You tallied all of the lumber that was on the scow at the time it arrived at Port Blakely, or caused it to be tallied?

A. Yes sir.

Q. And you made memoranda of that at the time, did you?

A. Well, I turned the tally sheet into the office.
Q. And that is the tally sheet you refer to at this time?
A. Yes sir.
Q. Your recollection is that it was between forty and fifty thousand feet?
A. Yes sir.
Q. That was all the lumber that was left on the scow?
A. Yes, that was on it.
Q. Not to exceed fifty thousand feet?
A. No sir.

CROSS EXAMINATION.

BY MR. GORHAM:

Q. What time of day did you examine the scow—you say at night?
A. It was night time when I saw the scow on the beach?
Q. Did you discharge the scow yourself?
A. Yes sir.
Q. Under your supervision, I mean?
A. Yes sir.
Q. What date was that, do you know?
A. It was on Sunday. I don't know what day of the month. I think it was the following Sunday after the scow arrived at the mill?
Q. Did you see this open seam on the Sunday, or prior to the Sunday when you discharged her?
A. Oh no, after the scow had been beached; she was under water when discharged.
Q. Where was she made fast over there when she came in?
A. At the wharf.
Q. And you examined her after she had been discharged in the dock?
A. I did not examine her, I just noticed this one when they were draining the water out of her.
Q. Then you did not make an examination?
A. I did not make an examination, but I saw this.
Q. What you saw was an open seam on one end of the scow, was it?
A. Yes.
Q. How far from the top was it?
A. It was in the top seam.
Q. How far from the top of the scow on that side?
A. I should think about 14 or 15 inches.
Q. And it was only the one seam that was open, was it, that you saw?
A. That was the only one I saw.

Q. Was that seam open from the end of the scow and running to the other end? Or was it across the scow?
A. Ran lengthwise of the scow.
Q. Did you come around to look at the end of the scow to see where the seam was?
A. No.
Q. Or to see whether there was an opening there or not?
A. No.
Q. Did you see the name on the end of the scow?
A. Yes.
Q. And that was the end that was damaged, was it?
A. I could not say as to that.
Q. You said you saw the name?
A. I took the name of the scow after I had discharged her and put it on my tally sheet.
Q. You do not know what end the seam was in?
A. No.
Q. Did you go inside of the scow?
A. No sir.
BY MR. RYAN:
Q. You say before the lumber was discharged the deck of the scow was partly submerged.
A. Yes.

(Witness excused.)

STAFFORD WILSON, a witness called on behalf of claimant, being duly sworn, testified as follows:

BY MR. RYAN:

Q. Where do you live, Mr. Wilson?
A. Everett.
Q. What is your business?
A. Well, I do the construction work around the Canyon Mills, all the outside work mostly.
Q. You mean by the Canyon Mill, the Canyon Lumber Company?
A. Yes sir.
Q. How long have you been in that line of work?
A. Well, somewheres in the neighborhood of 12 or 13 years; may be a little more than that; I could not be certain of that.
Q. In your construction work you have charge of the construction of scows and barges?
A. Yes, what they have there.
Q. And were you in the employ of that company in the month of December, 1918?
A. Yes sir.

Q. Did you have charge of the repairing and taking care of the scow *Claire*?

A. Yes.

Q. How recently prior to the 18th of December had you done any repair work on this scow *Claire*?

A. Well, we repaired that scow along—I could not say definitely, but somewheres along—it might have been June or July, somewheres around there, we got through repairing that scow; it might have been a little later than that; I could not say exactly.

Q. Now we will come back to the repair that you did at that time later. Let me ask you now, at the time she was loaded with this cargo of lumber for the Dominion Mill Company, did you go over and examine her at that time, personally, yourself?

A. You mean the morning she left?

Q. Yes.

A. Yes sir.

Q. Before she was loaded?

A. No, she was loaded then.

Q. She was loaded then?

A. Yes.

Q. Did you, just before she was loaded, make any examination of her or do any repairs upon her at that time?

A. No sir.

Q. Now will you tell what repairs, or in what way she was repaired in the month of June or July, 1918?

A. Well, we had all the guard rails off her; and we recorked her and cemented the corks and painted her and put her in good shape.

Q. Did you do anything to the deck?

A. Yes, we patched the deck and put on what you might call a false deck; it was along the planks, put right on top of the other deck.

Q. How large a scow was that?

A. I think she is 34x120.

Q. And just tell something of her construction? How many compartments?

A. There is five gunnels; that is, two outside walls and three inside would make four channels in that scow and four hatches in each end.

Q. At the time of this repair was she made tight?

A. Yes sir, she was.

Q. How frequently after that repairing, what is the best of your judgment as to the number of times she was used for carrying cargo of any sort?

A. I could not really say, only she was carrying loads right along; she was in the service right along.

Q. And when she was loaded and put in service, it was your duty to inspect her and overlook her and examine her?

A. Yes, whenever any one told me something was wrong, I was the one that went down and attended to that.

MR. GORHAM: I move to strike the answer as not responsive to the question.

A. I attended to the repairs, yes.

Q. You kept her in repair from that on?

A. Yes sir; whatever was necessary.

Q. Do you know the carrying capacity, the approximate carrying capacity of that scow of lumber?

A. I guess she would carry around 300,000 feet, somewheres.

Q. On the morning of the 12th of December, she was loaded with this cargo of lumber for the Dominion Mill Company at the mill of the Canyon Lumber Company, was she?

A. Yes sir, I expect that is where she was going; I did not know at the time.

Q. It was this trip that she took where she lost part of her cargo?

A. Yes.

Q. And in what way was she placed for loading?

A. Well, they have a gridiron there that the scow sets on; they are piling driven in the ground, then sawed off and capped, and the scow sets on that; they are put every eight feet apart.

Q. And after she was loaded you made an examination of her?

A. There was one hatch off her and that morning I went down and put that new hatch on.

Q. Did you look in the gunnels to see whether or not she was leaking, taking water?

A. There was nothing wrong with the scow that I could see.

MR. GORHAM: I move to strike the answer as not responsive to the question.

Q. What other examination did you make of her at that time?

A. That was all, only I put the hatch on and seen that all the rest of the hatches were on.

Q. Did you look into the gunnels to see whether or not she was carrying any water at that time?

A. No sir, she had no water.

MR. GORHAM: I move to strike the answer as not responsive to the question. He was asked if he looked to see

any water and he does not say he looked.

A. I would say no. There was comparatively no water in her; she might have been damp; I could not say there was not any.

Q. Did you look in the hatches, in the gunnels? Do you recollect whether or not you did?

A. I could not say.

Q. What do you base your answer on that there was no water in the gunnels and she was comparatively dry?

A. Well, I looked in there, of course, when I was at the hatches.

Q. You gave this scow a general examination, the same as you give scows in sending them out of port?

MR. GORHAM: I object as leading.

A. Yes.

Q. I wish you would state again just what you did at this time in the way of looking over that scow when she was loaded with the cargo for this trip. You may detail over if necessary what you have already said: I wish you would contain it in one statement as best you can.

A. Well, the best I can remember, I went down there and fixed that hatch, put in a new hatch on the scow, and looked at all the rest of the hatches, and they were put on and everything was in proper shape as far as I could see; and as I put on these hatches and looked to see if they were right, I naturally looked in the scow to see and I know there was no water in that scow.

Q. Were you there when the Pacific Towboat Company's tug came to take the scow away with the load of lumber that was delivered at the mill to it.

A. Yes, the tug was there at that time.

Q. Did you watch her make fast to the scow?

A. No, I did not watch the tug make fast to the scow.

Q. Tell what, if anything, you next saw of the towing of the scow from the mill, after you made the examination and you saw them come up and take her away?

A. Well, I picked up my tools and I had some other work to do, I don't just remember what it was, and I started toward the mill, and when I got partly away a man said the scow was on the bank—

MR. GORHAM: I move to strike what some one else said.

MR. RYAN: That may be stricken.

Q. Did you see the scow there?

A. Yes.

Q. Go ahead and tell what you saw.
A. I stopped and looked at the scow.
Q. Where was she?
A. She was on the bank of the river, up against the bank of the river.
Q. And she was then in tow of this tug boat *Defender*?
A. I could not say whether that was the name of it or not.
Q. Well, it was the Pacific Tugboat Company's tug, was it?
A. I think it was.
Q. You saw her upon the bank?

MR. GORHAM: He did not say that.

A. I saw her against the bank.
Q. Was she moving at the time or being moved?
A. Well, she was moving— I don't know whether she was moving with the current or with the tug; it seemed to be mixed up in some way.
Q. And how long were they there on the bank?

MR. GORHAM: He has not testified she was on the bank; he stated she was against the bank. He declined to say she was on the bank.

Q. How long was she there?
A. I could not say how long. I just looked a few minutes. I could not state how long she was. I turned and went to my work. That is all I remember about it.
Q. Did you see her again after that, on this trip, before she got out of the river?
A. No sir, I did not.
Q. Where is this mill located, on the river?
A. On the Snohomish.
Q. And how far was it from there to the mouth of the river where it empties into the waters of Puget Sound?
A. It is hard to judge water. I don't know what estimate I really should put on that.
Q. You need not estimate it, we will have some one else testify about that. Will you describe the shape and length of the channel to the mill?

MR. GORHAM: If he knows.

Q. I assume you do know the form of that channel down to the mouth of the river?
A. Well, the river runs, I should judge, in a kind of a— it would not be quite north and south, but it is almost, right at the Canyon mill, of the main channel; it runs down with a kind of a swing; and Steamboat Slough runs on down this

way, and leaves a kind of a bend in there; that is where the scow went down there, Steamboat Slough.

Q. The scow did not go down the main channel?

A. No.

Q. Went down what is called Steamboat Slough?

A. Yes.

Q. Could you illustrate that by a drawing?

A. Nothing more than I have told you; you have to have the directions.

Q. Is there a bend in the slough there of that channel, where this tug went down?

A. Yes sir, down quite a ways below.

Q. How much of a bend, or how far below the mill is it?

A. I would say that bend was a mile; I don't know that.

Q. Where was it this scow was put on the bank?

A. I mean the bend where the scow goes out of sight from the mill.

Q. Then you could see the scow and the tug how far distant from the mill?

A. I should judge a quarter of a mile where I seen her ashore there.

Q. It was a quarter of a mile from you, the mill, where you saw her?

A. I should judge about a quarter of a mile.

Q. Did you see the scow after she was returned from this voyage to the Canyon Lumber Company, and make an examination of her?

A. Yes sir.

Q. Did you make repairs on her at that time?

A. Yes, we fixed her.

Q. Tell what condition you found the scow in on her return from the mill?

A. Well, she had a crack opened up in front in the corner, in one of the corners.

Q. What was the width of that and the length, approximately?

A. I should judge it was opened up about ten feet and the width was three or four inches opened when she came back.

Q. Just an opening in a seam so as to make a seam in the scow or was there any bruising of timbers in there that showed evidence of having been split or broken?

A. No, it was in the corking where the opening was.

Q. How far from the top of the scow was this?

A. About 15 inches, probably.

Q. When this scow was loaded with lumber, was the load extended over the sides of the scow any?

A. No sir.

Q. And was it made fast on the scow, tied down properly?

A. Well, they put cross-ties on there when they load the loads, and it was tied properly—supposed to be, and properly loaded.

CROSS EXAMINATION.

BY MR. GORHAM:

Q. Are you a seafaring man, Mr. Wilson?
A. No sir.
Q. Did you ever go to sea?
A. No sir.
Q. Have you ever worked in a shipyard?
A. Some, yes.
Q. Whereabouts?
A. I have done some work back in the east.
Q. When?
A. Oh, may be 20 years ago.
Q. Whereabouts in the east?
A. Green Bay.
Q. Long Island Sound?
A. No sir.
Q. Green Bay, Wisconsin?
A. Yes.
Q. What character of vessels?
A. Well, it was not—I did not work there very long.
Q. How long?
A. Oh, may be three or four months.
Q. What did you do?
A. I just worked around at common work.
Q. You do not consider yourself a ship builder?
A. No sir, I don't hang my face out for a ship builder.
Q. You do not pretend to be an expert on construction of seagoing craft, do you?
A. I don't know just how to answer that, that is quite wide.
Q. I want your answer. I ask you if you consider yourself an expert as to the structure of seagoing craft?
A. No sir.
Q. You repaired this scow in July of that year?
A. Well, somewheres around in July.
Q. She was repaired in the summer some time and thoroughly overhauled?
A. Yes sir, she was well fixed up.
Q. Had she opened any seams at that time, before you repaired her? Any seams open?

A. Not any more than in a scow than would be if they needed repairing.

Q. I did not ask you as compared with other scows. I ask you if at the time you made the overhauling in the summer of 1918, her seams were open?

A. No.

Q. They were not?

A. No, not opened any more than she needed repairing.

Q. Well, will you tell the Court what you mean by that answer?

A. I don't really understand the question.

Q. All right, I will straighten it out. I don't want to mislead you.

A. I want to answer all right.

Q. When you overhauled that scow in the summer of 1918, what were the conditions of her seams?

A. Well, she needed recorking, some of them.

Q. Whereabouts?

A. Well, in the cracks.

Q. Well, how wide were these cracks? What was the widest of the cracks you saw in the summer of 1918?

A. Well, these cracks would be on the outside and some of them a half inch and some less than that.

Q. And some a little more?

A. Well, might be. But they would not be going clean through the scow.

Q. No. She had a name on her stern, did she?

A. I do not know which end you call the stern.

Q. We will assume she had a name on one end, and we will call that the stern. Did she have any names on her side?

A. Yes sir.

Q. Whereabouts, at the other end from the stern?

A. Yes; she had a name on the one end—I would not call it front, I don't know which is front; but on one end then there is a name on each corner here.

Q. On the other end of the scow?

A. On the other end of the scow.

Q. Now do you know how she lay on the gridiron the morning the *Defender* towed her out? Was she laying with the end on which her name was written down stream or up stream?

A. I could not say.

Q. You don't know. Now you say that day she was towed you only put one hatch on?

A. I put a new hatch on.

Q. Did you batten down all the other hatches?

A. Some of them were down.

Q. And others what?

A. Some were up, when they load they sometimes pull a hatch off to let the air get into the scow.

Q. Whose duty would it be to see that these hatches were properly corked or made tight?

MR. RYAN: I object.

MR. GORHAM: I want to find out who is responsible for doing it.

MR. RYAN: I will not object, if the witness knows.

A. I think Mr. Neimayer is the one. He took the responsibility to see that these hatches were right, and then if there was anything to do, I am called on to correct these hatches.

Q. The work is yours and the inspection and responsibility is his?

A. Not altogether.

Q. How much is his and how much is yours?

A. He loads the scow and he generally inspects them and sees if there was anything in there or whether anything was going wrong, or any leaks; why then I am notified.

Q. Now you say that you put on one of these hatches and battened it down. Did you cork it?

A. Yes.

Q. Which end of the vessel was that on, the down stream end or the up stream end?

A. That was the upstream end.

Q. Right underneath the bunkers or chute where the lumber comes down?

A. No sir, the chute was the down stream end.

Q. You are sure?

A. I have been long enough there; when the tide water runs out it runs out that way.

Q. I am not trying to mislead you, but you are mistaken about that, that is all. I will show you a photograph which I will ask to have marked for identification.

Photograph marked Petitioner's Identification A.

A. The chute is not there.

Q. Now, as a matter of fact, that photograph was taken last month. The chute is not there; the chute is up stream, is it not?

A. Yes.

Q. Was it not up stream in 1918, in the same place?

A. It must be, it never was moved.

Q. Now, which end of that scow, and this is a photograph of the scow *Claire,* as we will show hereafter, which end of that scow, the up stream or the down stream end,

did you put the hatch on?

A. The up stream end.

Q. And it was underneath the chute, was it not?

A. No sir.

Q. There was not any chute there?

A. Yes sir, the chute was there.

Q. The chute was on the up stream or down stream end of the scow?

A. The down stream end as I remember, the scow was on the upper end of the chute.

Q. Is that chute a movable chute?

A. No sir, it is a permanent chute, this part of it; it can be raised up or down.

Q. It has not been moved for the last two years?

A. Not any more than some repairing done to it.

Q. How high was the lumber above the hatch that you put down and made fast?

A. Well, high enough so that I could get in there to the hatches; I don't know exactly.

Q. That is very indefinite. The Court might think you were standing up?

A. A couple of feet.

Q. What is the dimensions of that hatch?

A. Well, I should judge these hatches on the *Claire* was about 20x23.

Q. And was that hatch you battened down a hatch on the side of the scow or in the middle of the scow or at the end?

A. It was on the top of the scow, on the end.

Q. Was it on the side or was it in the middle?

A. If I remember exactly right, I think it was the second hatch from the river side of the scow.

Q. But you don't remember?

A. Not exactly, no.

Q. Your memory is not very good about it? That is, you did not make any attempt to make any vivid impression at the time?

A. No sir.

Q. Now, you say the bend is about a mile down the river from the mill, the bend in Steamboat Slough, where the vessels go out of sight?

A. May be more or less. I would not say definitely.

Q. And that you think the vessel went up against the bank about a quarter of a mile from the mill?

A. Somewheres in that neighborhood.

Q. Now you testified at a former trial involving these same questions between the Dominion Mill Company and the Canyon Lumber Company, that the front end of the

scow hit the bank?

A. Well, I might have said the front end.

Q. That is the way it was headed?

A. Yes.

Q. But you did not know how she was headed, with respect to this name on her stern, did you?

A. No sir. I don't think I testified about her stern end or her name.

Q. Did she strike on the right hand bank of the river or left hand bank of the river?

A. Right hand bank as I remember.

Q. She was going down stream?

A. Yes.

Q. And the tug was between you and the scow, was it?

A. Well, I could not say whether the—which end the tug was on, or whether she was on the side at that time. I know they were maneuvering there at that time.

Q. At the time you stopped and looked at this maneuvering and saw this vessel up against the bank, cannot you state whether or not the tug was between you and the scow?

A. No sir, I could not just say now.

Q. How long did you watch there?

A. Oh, probably three or four minutes; may be not that long. I did not stop very long, because I had other work to do.

Q. It was not your business, was it?

A. No sir.

Q. Had she already come up against the bank when you saw it or was she just approaching the bank?

A. I think she was against the bank.

Q. Did she seem to be in any distress?

A. I could not say.

Q. Did you examine all the hatches to see whether they were properly corked, or was that Neimayer's business?

A. I looked around the hatches there.

Q. Before she went out that morning?

A. Yes sir.

Q. After she was loaded with lumber that morning?

A. Yes sir.

Q. They were all properly corked?

A. To the best that I remember now they were all right, everything was O. K. on the scow.

Q. How long had that corking been in?

A. In the hatches?

Q. Yes.

A. Well, the corking sometimes is put in—I don't know, I could not state positively the length of time that corking was in; sometimes they take the hatches off, you see.

Q. The hatches set down inside the coaming, did they not?

A. Yes.

Q. And each one of the hatches of the vessel were on?

A. Each hatch was all right.

Q. Now what was the condition of the vessel when she came back after going down the river that morning, when she next came back to your mill, what was her condition?

A. Well, one end of her was all cracked in.

Q. Now how far did that crack run from the corner?

A. You mean from the end of the scow back?

Q. Yes.

A. I should judge ten feet.

Q. And that was the crack you refer to heretofore about 15 or 18 inches below the deck?

A. Yes, somewheres in that neighborhood.

Q. Do you remember a split inside?

A. Some timbers split inside.

Q. What is the diameter of that split inside?

A. Well, there was one of the gunnels in there—here was the corner sets this way; you see the deck is in that course over these walls, you can call them walls.

Q. These gunnels or walls come from the bottom to the top?

A. Yes, the bottom nailed on the bottom and on top from the deck, and they spike them right down into that gunnel, along this top gunnel. And I think the first one inside there was a timber split about 30 to 40 feet back.

Q. At which end of the scow?

A. On the same end this opening was on the outside.

Q. The same end where the open seam was. And which gunnel was it, the gunnel on the outside of the scow or the first gunnel inside?

A. The first next to the outside, I think it was.

Q. You are positive there was a split in the timber 30 or 40 feet?

A. Yes, a new split.

Q. Have you ever examined it since that time, since she came back?

A. Since that time?

Q. When she came back and you found that split, have you examined her again?

A. I don't know that I have. I fixed her up after that time when she came home.

Q. Did you put new timbers in?

A. No sir.

Q. That split timber is in there?

A. That split timber is in there. We drove more spikes

through the deck down into it at that place.

Q. And the split timber as you say still remains on that scow?

A. Yes.

Q. You are sure about that, are you?

A. Yes. Spikes were driven down from the deck of the scow. And this split, you see, run along and kind of came in a wedge fashion off.

Q. Was it split from driving drift bolts through?

A. No sir. It was the spikes from the top, I suppose there was some strain or something; that is what I think.

Q. You don't know that?

A. That would be the only way it could be done, some strain. And these spikes would naturally on one half of the wall. would split the timber.

Q. Thirty or forty feet?

A. I should judge 30 or 40 feet.

Q. Now when she came back and was repaired, and you saw this open seam on the outside, and this split of the gunnel on the inside of the end of the scow that had the open seam, was that the end that had the name on the stern of the vessel, across the end of the vessel?

A. Yes. I would say the scow would set up-river like that, and the name would be on this end, and that split end was right here, on the right hand corner looking up-river.

Q. Right hand corner looking up-river, but the lower river end of the scow?

A. You and I have certainly got that river mixed up.

Q. What is the condition of the scow, as compared to her condition when she came back to you and you overhauled her, after December, 1918?

A. Well. I would consider she was in fair condition now because they are loading her right now.

Q. And she is practically in the same condition she was so far as her construction?

A. I guess she is practically that way right now.

Q. She is practically in the same condition, as far as her structure is concerned, as she was after you overhauled her in December, 1918?

A. As compared with the—

Q. I say, is the structure of that vessel now about the same as it was after you overhauled her after Port Blakely?

A. I would not want to say that, because that is about three years ago and the wear and tear of the scow would make some difference after repairing her.

Q. But it would be just the ordinary wear and tear?

A. Yes.

Q. Nothing has happened to the scow since that voy-

age, when you say you saw her up against the bank, that would cause any injury to her structure in any way?

A. Nothing that I know of.

Q. You do not know anything about her position at Port Blakely, or what they did with her, or how she lay on the beach?

A. No sir.

Q. You don't know anything about that at all?

A. No sir.

Q. You would not say but what the way they handled her at Port Blakely might have been the cause of the condition as you saw her when she came back, as far as your personal knowledge goes?

A. No, I would not say anything about that.

Q. You haven't any personal knowledge about it one way or the other?

A. No sir.

Q. Have not any personal knowledge that the injury you saw there had to the fact that she went up against the bank? You haven't any personal knowledge of that?

A. No sir.

REDIRECT EXAMINATION.

BY MR. RYAN:

Q. You were asked whether you were an experienced shipbuilder. You did not pretend to be an experienced shipbuilder?

A. No sir.

Q. But you do know how to construct scows?

A. Yes.

Q. Have been building them for 13 or 14 years?

A. Yes, I helped to build these scows.

Q. On scows used for carrying lumber, is there any bow or stern?

A. Not that I ever heard about.

Q. You never heard of that. And regardless of where the name may be, she may be towed one time with the name forward and the next time aft?

A. Yes, I think it depends all on the loading of the scow.

Q. Do you know which end, with reference to where the name was placed on the scow, was headed down river when she was towed away by the tug *Defender* of the Pacific Tow Boat Company, that this cargo of lumber was on?

A. No sir, I could not say.

Q. You did not notice that?

A. No sir.

Q. And, in your opinion, what was the cause of opening or break of this scow at that point?

MR. GORHAM: I do not see how he can answer that. He did not say on cross examination that he had any personal knowledge as to whether it was done at the bank or whether it was done at Port Blakely.

Q. Well, what would cause an opening in a scow, such as you discovered on her after her return? In your opinion what would cause that?

A. Well, there might be a good many causes. If she got on a bar or was heavily jammed into something, with a heavy load on. I don't know; quite a few things.

Q. A jar, coming in contact with something solid with a heavy load on. Now when she was taken from the mill she had a heavy load on, didn't she?

A. I don't know whether she was loaded to capacity or not.

Q. Whether or not to capacity you would consider it a heavy load?

A. Quite a load.

Q. A load of the capacity such as you have referred to, when you say she would have a heavy load on and came in contact with something else?

A. Yes, I would say so.

Q. Such coming in contact with something solid would be the same as coming in contact with a bank of the river?

MR. GORHAM: I object as leading. Let the witness testify.

Q. Would a bank of a river, such as was there when you saw this scow after she started, when she was being towed from the mill, would that be what you would consider something solid?

A. Yes sir, I suppose it would be solid enough.

Q. In your opinion could that seam have been opened up, or could the timber in the gunnel of which you speak have been opened up, by the wash of the sea?

MR. GORHAM: I object. He is not a seafaring man. It is incompetent.

Q. In your opinion?

A. In my opinion I would say no.

BY. MR. GORHAM:

Q. This is a mud bank down there, is it not?

A. Well, I don't know exactly what it is.

Q. Have you ever been down there?
A. I haven't been down on the bank there, no sir.
Q. Don't you know that the Snohomish River is all mud bank, and all its deltas, and have been coming down there for thousands and thousands of years, the alluvial deposits?
A. I know it has soft places; I don't know how it is there.
Q. You do not know that it is not soft there, do you?
A. No sir.

BY MR. RYAN:

Q. You do know that there is a great deal of drift wood drifts in along the banks?
A. Yes, lots of driftwood comes down there.
Q. Do you know whether or not at that time it was filled with drift?
A. I could not say.

BY MR. GORHAM:

Q. What was the stage of the water?
A. It must have been high tide, because they do not move scows as a general rule before they get the tide.

(Witness excused.)

PERCY AMES, a witness called on behalf of Claimant, being duly sworn, testified as follows:

BY MR. RYAN:

Q. Where do you live?
A. Everett.
Q. What is your business?
A. Canyon Lumber Company.
Q. You are one of the proprietors of the Canyon Lumber Company?
A. No sir.
Q. You are an employee?
A. Yes.
Q. You were in their employ in December, 1918?
A. Yes sir.
Q. In what capacity?
A. In charge of the boom and log scaling.
Q. Did you have anything to do with the loading of the scow *Claire* on or about December 12th?
A. No sir.
Q. Did you examine her in any way at that time?
A. I don't think I did.
Q. Did you see her when she was being towed away from the mill?

A. Yes.

Q. Did you observe which end of the wharf, where the name is on the scow, whether that was headed down stream.

A. No, I could not say.

Q. What, if anything, did you observe when she was being towed away from the mill by the tug *Defender*?

A. I saw the scow at the bank.

Q. Did you see it go into the bank?

A. I saw them when they ran up to the bank.

Q. How far distant was that from the mill?

A. It is hard to guess, but I should think it was close to a quarter of a mile; it might be less.

Q. What route did she take on leaving the mill?

A. Steamboat Slough.

Q. Did you observe how she was made fast to the scow, whether she was being towed or made fast alongside?

A. Alongside.

Q. And on which side was she being towed by the tug, if you remember?

A. I do not remember that.

Q. But the side where she was would put which of them against the bank?

A. The scow.

Q. How long did you stay there? Until they had her released from the bank?

A. Yes.

Q. How long was she there at the bank?

A. Oh, she might have been a minute or half a minute, hard to remember. I cannot remember that. I know they just swung around to the bank and went down the river.

Q. You did see her go against the bank?

A. Yes sir.

Q. Did you notice whether or not the tug stopped and swung with the current when she hit the bank?

A. The tug stopped?

Q. Yes, stopped its momentum and swung with the current and went into the bank?

A. Just at that time he was stopped.

Q. Will you tell the Commissioner, Mr. Ames, all that you saw of this?

A. He was practically in, really broadside, he was two thirds broadside to the river when he touched the bank; after he touched the bank he got right around, he did not stop any more than to square himself in the river and go again.

Q. Do you know what the condition of the bank of the river was at that time, with reference to there being wood in there?

A. It was high water; the tide had just started to ebb, just ebbing.

Q. Did you see the scow when she was returned to the mill?

A. Yes, I saw it.

Q. Did you examine her yourself?

A. Yes, I saw the crack in her.

Q. Just tell us what you saw?

A. I cannot remember exactly. I know there was a raised deck for a number of feet; just how far I could not tell.

Q. Was that opening in her something that would be plainly visible from outside of the scow?

A. Well, it would, if you were down low enough to look at it. We could see the scow was raised up. I don't think we could see the crack unless on the same level with the scow.

CROSS EXAMINATION.

BY MR. GORHAM:

Q. I show you a photograph which I will ask to have marked Petitioner's Exhibit B, and ask you if you recognize that?

A. Yes.

Q. That was taken the other day down at Everett?

A. Yes.

Q. That is a view of the river, of Steamboat Slough of the Snohomish River, from the Canyon Mill, is it not?

A. Yes.

Q. Does that disclose the place where the scow went against the bank?

A. Yes sir.

Q. I will ask you now with reference to that little shed on the right hand side of the picture. Can you tell from the position of that shed, whether or not that photograph takes in sufficient scope of the river to include the place where the scow came against the bank?

A. Yes sir, it does.

Q. I show you another photograph which has been marked C for identification, and call your attention to the arrow pointing downward, and ask you if you recognize that scene?

A. Yes sir.

Q. And the arrow points to the place where the scow came against the bank?

A. Yes.

Q. What is the nature of that bank along there, soft mud?

A. Yes, it is all muddy soil.
Q. It is alluvial deposit, is it not?
A. Yes.
Q. I show you a photograph which has been marked D for identification, of the scow *Claire,* taken at the same time these other photographs were taken. Do you recognize it?
A. Yes sir.
Q. The bow of the scow in the foreground is the end of the scow that you saw subsequently in a damaged condition, the seam opened, and that is the end that has the name of the scow on it? Is that right?
A. Yes.
Q. Now do you see evidence of cement being put in there at that corner, some two feet below there, two feet below the deck of the scow?
A. I can see something there.
Q. Did you see that end of the scow the other day, so that you could tell whether that was cement or not?
A. Well, there is cement on one end, but I cannot tell on what end of the scow it is on.
Q. On the end that was injured at the time this vessel went over to Port Blakely and came back?
A. I would not say about that either. I cannot remember that part of it.

REDIRECT EXAMINATION.

BY MR. RYAN:

Q. You do not know whether the condition of the scow, as shown by Exhibit D—you do not know whether that is in the same condition it was two years ago, do you, when this accident happened?
A. Well, you mean that cement showing?
Q. Yes.
A. I would not say.
Q. You don't know?
A. I cannot remember that.

BY MR. GORHAM:

Q. Who would put that cement on there, if anybody? Whose duty would it be?
A. Mr. Wilson, I think.

MR. GORHAM: We will ask to have Mr. Wilson remain in Court here in order that we may recall him.

MR. RYAN: I will recall him now.

(Witness excused.)

STAFFORD WILSON, recalled for Claimant for further

DIRECT EXAMINATION.

BY MR. RYAN:

Q. I call your attention to libellant's Exhibit D for identification, and ask if you recognize that as being a photograph recently taken of this scow in question?

A. Yes sir, that is the scow.

Q. Now can you tell from that photograph, can you now tell where this opening was in the scow at the time she was returned, or are you sure you know where it was?

A. Yes, I am positive where it was.

Q. Will you indicate on this petitioner's Exhibit D where the opening in the scow was when she was returned?

A. There is a crack right up in there. I will put a mark there.

Q. You may mark on this Petitioner's Exhibit D with this red ink just where that crack was, according to your best judgment, on this scow, when she was returned to the mill after her trip to Port Blakely?

A. Yes sir, there is the crack right there.

Q. I will mark that for you with an arrow to indicate where the crack is underneath there.

A. Yes.

Q. Is that where the crack was?

A. That is where the opening was when she came back.

Q. And how long in distance?

A. I should judge about 10 feet from this corner back here.

BY MR. GORHAM:

Q. From the end of the scow toward the other end?

A. Yes.

BY MR. RYAN:

Q. There has been some comment here by counsel in calling the attention of a witness to what appears to be some cement put in the corner. Is there any cement or anything appearing on the scow there?

A. Yes, there is some cement on that corner, I think. That has not been on a great while. At the time we repaired that scow that cement was not there.

Q. Then in that respect the scow is not in the same condition she was when it was loaded with this cargo of lumber?

A. Oh no. You can see this part of the guard rail off here. This corner is loose. That is why I tried to make that

plain to the attorney. I did not want to answer it just as he put it.

Q. So that she has had over two years of use since that time, has she?

A. Yes.

Q. And her condition is not in all respects as it was at the time she carried this cargo of lumber?

A. No.

Q. Could you indicate by a mark on the deck of the scow approximately where the timber part of the gunnel was split?

MR. GORHAM: That is below deck.

Q. Indicate on the deck, if you can, where it was.

A. I cannot see very well without my glasses. The first gunnel was right there between these two hatches. There is a hatch and there is a hatch; and there is one hatch closed, and there is one, two, three, four hatches. The first gunnel from this outside would be just between these two.

Q. (Counsel indicates in exhibit points where hatches 1, 2, 3, 4, were located.) Where was the gunnel timber located with reference to hatches 1, 2, 3, and 4 on Petitioner's Exhibit D?

A. Between one and two.

Q. I will mark on there G. T., meaning gunnel timber. Now you say it was at that point, and the timber was extending back about how far?

A. Well, about 30 or 40 feet; at any rate to the very end of the scow, it started back a little bit, as near as I can remember, that is the gunnel as I said in my testimony.

Q. I believe I asked you before, but to be sure, do you know which end of the scow was headed down stream?

A. No sir.

Q. Can you tell which part of the scow went against the bank from where it is now?

A. No sir.

CROSS EXAMINATION.

BY MR. GORHAM:

Q. You say cement was put on there since the vessel came from Blakely?

A. I do not think there was any cement on the scow at that time like that. There was a guard rail off that corner, and that is why that shows. At least this picture shows that the guard rail is off, the piece that comes up from the bottom.

Q. What would be the occasion for having that cement on?

A. We always cork and put cement on.
Q. Did you put cement on the other corner?
A. Well, if it is necessary, yes.
Q. But what made this cement necessary?
A. It might have rubbed against the pile there sometime. And to make this better we put on the cement before we put on that next piece up from there. There would not be any reason why it would not be solid as any other place.
Q. Is it not a matter of fact the cement was put on there because the timbers were rotten?
A. No sir.
Q. Are not these timbers rotten underneath that cement?
A. No sir.
Q. You are sure of that.
A. I am sure of that; not at that time.
Q. When the cement was put on?
A. No sir.
Q. That cement is a considerable distance below the place where this seam was, was it not?
A. Yes sir, according to the pictures, it is down some.

BY MR. RYAN:

Q. This cement makes it water tight wherever it is properly applied?
A. Not so much that as covering the oakum so that the oakum will not take water so bad and have friction.
Q. The cement serves to make the scow more seaworthy?
A. Yes.

BY. MR. GORHAM:

Q. Cement is put in there to protect the corking if there is a small strip put in, but when spread over as indicated by that photograph, then it is for some other purpose, and is not just to protect the oakum in there?
A. If I could explain to you sometimes that is done, but I would have to go back to a different thing and I don't suppose you would let me tell that.

MR. RYAN: Explain any way you want to.

Q. You can explain from your personal experience.
A. My own personal experience, we have had scows just down in the bay there and in a storm and was tied up and rubbed up against the dolphin, and there was no rotten timbers or anything, simply rubbing there, something like that there may be, and we might just to cover that up to

protect the oakum, we put on cement, but it is not in there deep.

Q. You mean generally speaking it is not in there deep? You are not referring to the photograph now. You don't know how deep that is in the photograph, do you?

A. Well, I don't know just how deep it goes in that photograph.

Q. You don't know how deep actually it is in the vessel today?

A. I am positive it is not deep.

Q. Do you know how deep it is in that vessel?

A. No, I would not state any depth.

(Witness excused.)

W. C. NIEMEYER, a witness called for Claimant, being duly sworn, testified as follows:

BY MR. RYAN:

Q. Where do you live?

A. Everett.

Q. What is your business?

A. Lumber inspector.

Q. Who are you employed by?

A. Employed by the Inspection Bureau, Seattle, but placed with the Canyon Lumber Company.

Q. How long have you been engaged in that line of work?

A. Fourteen years.

Q. What are your duties as lumber inspector?

A. Inspect and tally lumber.

Q. Do you have anything to do with the loading of scows for the Canyon Lumber Company?

A. Yes, I have. I look after all the loading of scows there.

Q. How long have you been engaged in that line of work?

A. 12 years.

Q. You were also employed there in the month of December, 1918, were you?

A. I was.

Q. What did you have to do with the loading of the scow *Claire* on or about December 12th, 1918, with a cargo of lumber to be taken by the Dominion Mill Company at Port Blakely?

A. I loaded her.

Q. And did you examine the scow before she was loaded?

A. I did.

Q. Just tell what examination you made and what was the results of that examination?

A. Well, when a scow came, the first thing we do is to go down and look at them and drain them and see they are all right before we load them.

Q. You did that with this particular scow, did you?

A. I did.

Q. You made a complete examination of her?

A. I examined her and saw that she was seaworthy to take that trip to Blakely.

Q. Were there any openings in her sides?

A. There was not anything there that I could see, you know. There was no water. I drained all the water when she came in on the trip; because sometimes there are two or three inches in scows and sometimes may be more than that, four or five.

Q. How were the hatches?

A. The hatches were all on and corked.

Q. Did you notice, when she was loaded, with reference to the name of the scow, which end was headed down stream?

A. I did not. I would not pay attention to that, on account of both ends being the same. They come in one end one time, and the next time they take them out, the other. Which ever is down; we try to get a rake of three or four inches to tow, one end a little higher than the other, so that it would be better for the tow boat company.

Q. Down by the head or stern as she laid?

A. There is no such thing as head or stern. We load them which ever way they come in.

Q. As it happens?

A. And he will hook on to what I would call the light end, have that in front.

Q. Now I want this clearly in the record, Mr. Niemeyer. Is there any stern or bow to that scow?

A. I would say no.

MR. GORHAM: I object as incompetent. He is not qualified as a seafaring man or shipbuilder. He don't know anything about it, simply his opinion as a tallyman.

Q. You have seen this scow in use from the Canyon Lumber Company for some time?

A. For the last 12 years.

Q. And is there any fixed way of her being towed, that is, could she be towed from either end?

A. Yes, either, does not make any difference.

Q. And had been so used during the entire period of time she had been there?

A. Absolutely.

Q. Do you know whether or not this tow boat company had ever towed this scow before?

A. I could not say. I don't believe they ever had.

Q. Do you know when she had been repaired or overhauled?

A. I would say some time along in June or July.

Q. Did you observe what that overhauling consisted of?

A. Well, I was right close where I could see it. They recorked her; recorked the deck; patched them and put a false deck on top, to protect the other deck.

Q. What was her condition then after this overhauling?

A. She was absolutely seaworthy.

MR. GORHAM: I move to strike that as incompetent. This witness is not qualified as an expert.

Q. What do you mean in your own language, by being seaworthy.

A. I mean she did not leak; it was not in a leaky condition.

Q. And she had been used continually after that, had she?

A. Yes.

Q. For what purpose.

A. Towing lumber.

Q. The same as used at this particular time?

A. Yes.

Q. Do you know any other towboat companies that had towed her in the intervening time?

A. Yes, the American Towboat Company. I would not say that they had towed her between that time, but then they towed her lots of times. And Mr. Oliver there, with his launch, he has towed her many times.

Q. Were you there when they hooked on to her?

A. No sir.

Q. Did you see anything of her after she was finished loading?

A. No sir. I finished loading that morning and left, if I remember correctly, for Seattle.

Q. When did you next see the scow?

A. When she returned from Port Blakely.

Q. What condition did you find her in?

A. I found her at that time—there was a break in the end, the header lifted up.

Q. What do you mean by the header lifted up?

A. I think a 14x16, what we call a header on the scow, that is on the front end. That was lifted up on this front

where the cargo is, and around on the end, ten or twelve feet on the side and on the end.

Q. A distance of 10 or 12 feet on the side?

A. Yes.

Q. What distance on the end?

A. I would not say.

Q. Your best judgment?

A. Six or eight feet.

Q. Now, inside of the scow, what damage did you observe? Were you down in her?

A. Well, I noticed one of the bulkheads was lifted up also; what we call a gunnel running through the scow.

Q. Was that broken?

A. I would not say broken, but split. It was lifted up, went with the others. I did not notice whether broken. It was lifted up for 20 or 30 feet, something like that.

Q. You have during your 12 years time had occasion to examine these scows that have been used for towing cargoes to and from the mill?

A. I examine all that comes in there and see that they are seaworthy.

Q. And this change then that you noticed in the scow that you have testified to at the time she was taken and when she was returned?

A. Yes.

Q. In your experience and examination of these scows, after they have been used for the purpose of towing cargoes as in this instance, in your opinion could that damage have been done to the scow by the ordinary wash of the sea that you might meet on Puget Sound?

MR. GORHAM: I object. He is not qualified as a seafaring man.

Q. In your opinion what could have caused that damage to this scow?

MR. GORHAM: I make the same objection.

A. It seems to me it came in contact with something to raise that header up.

Q. Something, by which you mean something solid? Some solid substance?

A. Yes.

Q. For instance what, for example, in towing she would have to come in contact with what?

A. Come in contact with logs or stump or bank; anything solid so that she would raise it up.

Q. Was the opening which you saw in there, could that be plainly seen from the outside of the scow?

A. If you were down on a level with it you could see it.

Q. And how heavily was she loaded? Did she have a capacity load on at this time? How far above the water's edge would her deck be?

A. I would say about 18 inches.

Q. And if that opening had been in the scow at the time she was loaded with this cargo, the crack which you observed there when she was returned, could be plainly seen on inspection?

A. While being loaded, you mean.

Q. Yes.

A. Well, if you got down and looked; that is the only way you could see it. You would have to lay over the end of it. I would not say you could see it plainly.

Q. When a scow is loaded it is not loaded clear back?

A. No sir.

Q. There is sufficient room to lie down and look and make an inspection underneath?

A. Yes sir.

Q. What is the condition of the river there as to there being any sea at that point?

A. There is no sea.

Q. None until you get to the mouth of the river?

A. No sir.

Q. Where does the river empty, into what waters?

A. Port Gardner Bay.

Q. What is the name of the channel that leads from the location of the mill down the river?

A. Steamboat Slough and the main river.

Q. Both of these channels are navigable, are they?

A. Yes.

Q. Which one did this scow go out?

A. I do not recall; I was not there.

CROSS EXAMINATION.

BY MR. GORHAM:

Q. You were a witness in the case involving the loss of the cargo of this scow at this voyage, at Port Orchard, in a suit between the Canyon Lumber Co. and the Dominion Mill Company?

A. Yes.

Q. You testified there that you found the top of the 6x12 bulkhead was split 30 or 40 feet straight down. Is that correct?

A. I don't remember whether I did or not.

Q. I call your attention to the questions and answers:

"Q. Did you examine the inside of the scow?" A. I did." Was that testimony given?

A. That is a year ago. If you have the records there—

Q. "Q. Did you find anything, was your attention directed to any particular condition of the bulkhead? A. Yes." Do you remember that?

A. I don't remember these records.

Q. I am going to ask you each question and you can answer.

A. I cannot answer anything there. I answer what comes up now.

Q. I want to know if you remember this—

A. I don't remember it.

Q. "Q. Which one? A. The bulkhead on the right side." Do you remember that?

A. I don't remember any of this. I cannot remember what I testified.

Q. The next question, "Q. The first bulkhead adjoining on the side which you found the crack? A. Yes sir." Do you remember that question and answer?

A. I don't remember that.

Q. Next question, "Q. In what condition did you find that bulkhead? A. The top 6x12 split 30 to 40 feet straight down." Do you remember that?

A. I don't remember that.

Q. The next question, "Q. Was that a split in the timber itself? A. Yes sir." Do you remember that question and answer?

A. Do I have to answer this?

Q. Yes.

A. I cannot recollect what I testified to.

Q. That is very reasonable to suppose, very few of us can, but I am drawing it out. The next question, "Q. Was that a split in the timber itself? A. Yes sir. Q. Was that a fresh split or an old split? A. It was a fresh split." Do you remember these questions and answers?

A. I do not.

Q. Now is it a fact that this first bulkhead joining the side on which you found the crack was split in the timber itself 30 or 40 feet?

A. Well, I don't know whether it was in the timber itself. It was raised up. What I would call a crack would be an opening. I cannot say it was split.

Q. Cannot you say it was not split? Don't you know it was not split?

A. No, I don't.

Q. Have not you examined it recently?

A. That has nothing to do with it.

Q. Have not you examined it recently?

A. No sir.

Q. Did not you examine it with McNealy the first part of this month? Yes or no?

A. No sir, I didn't examine it.

Q. Did not you go down in the hold of the vessel with McNealy?

A. Yes sir.

Q. Did not he ask you to point out the bulkhead and the split in the timber itself of 30 or 40 feet?

MR. RYAN: I object, it is not cross examination.

A. I did. I went down with him in the scow and he asked me what bulkhead and I pointed out the bulkhead and that was all there was to it.

Q. Did you see then and there at that time that there was not any split in the timbers?

A. I don't believe I did.

Q. Was there a split in the timbers, irrespective of what you said was split?

A. I cannot say. I say there was an opening in that seam.

Q. You mean to say now, Mr. Niemeyer, that you do not know from your examination that day that McNealy went down in the hold with you, whether there was a split or not in these timbers?

A. I did not examine it.

Q. I did not ask you whether you examined it. Can you state under oath that you don't know that there was a split or that you do know there was a split?

A. I did not examine it.

Q. Was there or was there not a split there?

A. There was not any split there at the time we went down there? I should judge there was because I did not examine it.

Q. How do you judge, on what do you base your judgment, if you did not examine it?

A. If I examine anything I know what it is.

Q. You say you judge, and you did not examine it?

A. I did not examine. You haven't examined the contents of this room but you haven't a judgment of what is in it. That is what my judgment is on; I did not examine and I would not know. I would not know of a lot that is in here.

Q. You now say you do not think there was a split there, or that there is a split there?

A. At the present time I do not think there is a split there.

Q. You do not think there is a split there?

A. At the present time.

Q. Then if there is no split there at present, you were incorrect when you stated at Port Orchard that the bulkhead on the right hand side of the vessel where it was cracked, where the seam was open, was split in the timber 30 or 40 feet?

A. I still say there was an opening in that timber of 30 or 40 feet. I cannot say whether split—I would say a crack.

Q. If you say now you do not think there was a split there then you were in error in your former testimony that there was a split there?

MR. RYAN: I object as immaterial. It does not make any difference whether split or cracked.

A. It was split or cracked.

Q. He testified it was a fresh split in the timber itself. I am satisfied with that statement.

A. I still contend there was an opening; I don't know whether it was a crack or split. An opening was there.

Q. Now I show you Petitioner's Exhibit D for identification and ask you if the corner of the scow in the foreground is the corner of the scow that was injured as you saw it when it came back from Port Blakely?

A. There is one thing I would like to explain. When we went to Port Blakely, I did not know which end, whether the name was the name end that was broke or not. If you will look in the record, I testified to that after being back there.

Q. Was it the name end?

A. Yes.

Q. This shows in the photograph?

A. Yes sir, that is the corner right here where you see the mark is, the mark, raised up, this is the end that was raised up.

Q. What is the height of the stanchions on that scow, or were they at the time?

A. Two feet.

Q. Are they two feet?

A. I would not say positively; I think 18 inches or two feet; some differ, they vary.

Q. The towing posts are higher, but the posts or stanchions at the sides are only 18 inches?

A. Practically the same.

Q. Look at that photograph and see.

A. Well, they look here closer. You see now you get over here, you get closer, this is a tow bitt; does that one look higher than this one, when you are closer forward?

Q. You know the tow-posts are considerably higher?

A. I would say six inches or so.

A. This is higher, that is one third higher—that is considerably higher?

A. I contend they are six inches higher.

Q. How high was the lumber piled on that scow when she went out?

A. That would be about eight feet high.

Q. Eight feet from deck?

A. Yes.

Q. As that vessel lay on the gridiron and received that cargo, was the lumber chute up stream or down stream?

A. Up stream; I would say up stream.

Q. Up the river?

A. According to the way the scow was loaded.

Q. I don't care which end, but as she lay on the gridiron there, the upstream end of the scow, whichever end you call it, was where the chute was?

A. Yes sir; that would be up the river. That lumber comes down the chute this way; you load down here, and this end would be the up stream end.

Q. Now you testified at the former trial, didn't you, that this lumber was piled some seven or eight feet above the stanchions?

A. That would be all right, seven feet.

Q. You just said seven feet from the deck.

A. I said eight feet from the deck; correct yourself.

Q. Now you testified at the former trial that it was—that the lumber was piled seven or eight feet above the stanchions, is that true?

A. I do not remember.

Q. Was it seven or eight feet above the stanchions?

A. I say about eight feet from the deck; I am positive it was eight feet, not exactly within one or two inches, may be off. I will say around eight feet from the deck, not from the stanchions.

REDIRECT EXAMINATION.

BY MR. RYAN:

Q. You loaded this scow in the usual and careful manner, did you?

A. Absolutely.

MR. GORHAM: I object as leading.

Q. What did you do about making it—

A. Would you like to have me explain the loading?

Q. Yes.

A. In the first place there was 6x12 cargo, which was, if I remember 60 to 40 feet long, merchantable lumber. The easiest possible load that you can load on to a scow. It is all the one size 6 inches by 12 inches, and it was all level. You can load it level, it is not like where you have different sizes all mixed up. In a 6x12 load we load it four feet from the top, and don't bind for four feet; then we start the binding wall, put the binders four feet in there, and then up again to eight feet and then we put two feet in or whatever we need in the binders on the outside wing of the tiers on the outside of the scow; and that is to bind the load and keep it from going over or rolling off the scow.

Q. And you had binders all the way through?

A. We always have them put on to barges and on that barge, too.

BY MR. GORHAM:

Q. The binders commenced four feet from the deck?

A. Yes; we never bind below that, because it is not necessary.

BY MR. RYAN:

Q. Did the tugboat, when she came up, look over the scow before she hooked on?

A. They were not there when I left.

BY MR. GORHAM:

Q. What were these binders?

A. Kiln stock, sticks we pile lumber on in the kilns, eight feet long. And we use old lath, when there is some cargo left, and we use four and a half sticks like that. We have used these, and also used longer ones; mix them up so that they tend to bind both together at the same time. We generally make a four foot tier, binding all the time.

Q. How far apart?

A. They run along the sticks perpendicularly?

A. No, just as the load falls.

Q. On the top of the load?

A. All over the load.

Q. As piled up.

A. As piled up; so many tiers we lay binders in to keep the top load from rolling off.

Q. What was the dimensions of this stuff, the binders?

A. Three-eighths by 4⅝ths x 4; some ⅜ths by an inch and a half, like that.

(Recess taken until 1:30 p. m.)

AFTERNOON SESSION,

1:30 O'Clock.

Present: MR. GORHAM, for Petitioner.

MR RYAN, for Claimant.

MR. W. C. NIEMEYER, on the stand for further

CROSS EXAMINATION.

MR. GORHAM:

Q. I believe you testified formerly that there were 1085 pieces of lumber on this scow?

A. I don't remember just exactly but I had that data at that trial. 1085 pieces, that is right.

Q. That was the total load?

A. Yes.

Q. And 340,000 to 350,000 feet that was on the scow. And the difference between what was loaded on the scow and what was delivered at Blakely would be the amount that was lost.

MR. RYAN: Yes, that is what was lost.

Q. How many pieces were picked up, do you know?

A. I cannot say. If I remember the record read everything was picked up except 32 or 34 pieces.

MR. GORHAM: Is that right, Mr. Ryan?

MR. RYAN: They were all picked up.

A. They were all picked up except what was lost. I think there were only 32 or 34 pieces that were lost.

MR. RYAN: That is correct about the number of pieces that were loaded.

MR. GORHAM: We want to get the record straight before we get through.

MR. RYAN: We haven't that data. I think we can agree that there were 1085 pieces loaded, and 185 pieces that were delivered on the scow *Claire* at Port Blakely, approximately 46,322 feet. Now as I understand then, these items as to the number of pieces loaded, the number of feet on the scow when she was delivered at Port Blakely, that we are together on that, so that I will not need to offer any more testimony on that point?

MR. GORHAM: There is no question about that.

(Witness excused.)

OLIVER D. HANCHER, a witness called on behalf of Claimant, being duly sworn, testified as follows:

MR. RYAN:

Q. Where do you live?
A. Port Blakely.
Q. What is your business?
A. Operator of towboats; towboat business.
Q. How long have you been engaged in that business?
A. I have been operating boats for the last 17 years.
Q. On Puget Sound or its tributaries?
A. Since 1909 on Puget Sound.
Q. You have towboats of your own now?
A. Yes sir.
Q. Have you ever done any towing for the Canyon Lumber Company, or the Dominion Mill Company?
A. No sir, I have not towed any for the Canyon Lumber Company directly, although I have towed their scows a great many times for the Port Blakely Mill Company.
Q. And you have towed scows from the Canyon Lumber Company?
A. Yes.
Q. Did you ever have occasion to tow the scow *Claire*?
A. Yes sir.
Q. Previous to December 12, 1918?
A. Yes, many times.
Q. And how recently before December 12, did you tow the scow *Claire*?
A. I would not say, just to be exact.
Q. I would not expect you to be exact; just your best judgment.
A. Some three or four weeks previous to this accident.
Q. And previous to that time, when had you had occasion?
A. I have been towing this scow, that is four or five of these large scows and at that time I should judge that I was towing different ones, different scows out of there from that company an average about two trips a week.
Q. Do you have special remembrance of having towed the scow Claire, other than the trip two or three weeks before?
A. Yes, towed her many times, over to Blakely and back again to Seattle, and towed her all over the Sound here.
Q. Did you ever examine her condition?
A. Why yes, I always examine these scows every time I take hold of them to take them out, examine them to see whether they have water in them and what condition they

were in, so as to be sure to get it out of them anyway.

Q. What is your custom as an operator of a towboat with reference to making an examination of a scow before taking her in tow?

MR. GORHAM: I object as irrelevant and immaterial. There is no custom alleged here. And what his custom is would not matter.

A. Well, anybody that tows a scow and he wants to use any precaution at all, ought to examine the scow if she has got a load; take up the hatch and go down inside and see if there is any water in her, so that you could know that your scow is in proper condition to go out and make a trip.

Q. The hatches could be opened when she is loaded and you could go down inside, could you?

A. Well, some scows when you go after them, they have already put on the hatches and corked them down, and you could not get into them. Then the only way to ascertain whether there is water in them, they generally have a hole in the deck where you put a siphon or you might put a pike pole down there and see if there is any water in them. That is the only way to find out.

Q. Did the scow *Claire* have a hole in her deck that you could put a siphon in and siphon the water out?

A. Yes sir, she has.

Q. Was there any other way that you could examine the condition of the scow for the purpose of ascertaining whether or not she had an open place in her seams on the side?

A. You might look around on the outside. You would not be apt to examine the outside of the scow unless she had a heavy list, or at one corner, or something; then we would be apt to look to see what the trouble was.

Q. If you could go inside of any of the hatches when the load was on, then you could discover whether or not there was an opening in her side?

A. Certainly, if she had an opening in the side, you could hear the water run in, if the opening was below the level of the water. If it was above the level of the water you would not know it for a time.

Q. If it was above the level of the water and you could go inside the scow through the hatch, would there be any way then of determining it?

A. The hole would have to be so big the daylight would come through.

Q. Assume it were an opening of some six to eight inches in length and two or three inches in width, could you discover that opening, an opening of that size?

A. We would be very apt to notice that if you went in and examined the scow all through. But you would not be very apt to make that close an examination on a scow unless you knew she had water in her.

Q. But you would not be apt to discover it by looking in the hatch, looking down the hatchway?

A. No, not necessarily, no, you would not.

Q. How would you discover it?

A. The only way you could discover that would be by making a minute examination of the scow. And there is no captain that does that who is handling the scow unless they know something has happened to the scow.

Q. Well, when loading a scow you of course would discover an opening of that kind, would you not?

A. You would more certainly after she was loaded if that opening was below the water.

Q. If above the opening?

A. Not necessary; you would not; a man might go into that scow; she might have a hole in her and you not notice it.

Q. You would see daylight through there, through that much of an opening, would plainly show daylight?

A. It should.

Q. And you went inside the hatchway into the hold between one of the compartments, you could plainly see the light through that opening, could you not?

A. Well now, let me illustrate to you. Suppose a scow was up against a dock; say the dock was standing up here and you went down into the hatch and the corner of the scow is right close to the dock and it is dark there, that scow is up against the dock. You might have a hole there big enough to stick your hand through and not see it.

Q. Yes, captain, but if it is out where the light will come through, then you could see it?

A. Then you could see it.

Q. You will take the other assumption, that it is not dark at the side of the scow, then that opening of that size you could plainly see it by making an ordinary investigation, by looking in the compartment, could you not?

A. If you went down in there and went clear through the scow which very few people do.

Q. That does not make any difference, captain, what they do in that respect.

MR. GORHAM: I think that is the gist of that examination; you are trying to prove people do that and he says they don't.

A. A man would have no occasion to go into a scow.

If I went up to Everett, for instance, after this scow *Claire*—

Q. Just answer the question which I ask you, captain, then, if you want to explain—

A. That is what I was getting at.

Q. Then you could plainly see that opening, if there were daylight outside, if you went down into the hold of the scow? Just answer that yes or no.

A. That is a question in my mind whether a man would discover that hole or not.

Q. Could it be seen if you looked down the hatchway?

A. I would say no, you would not see it.

Q. Could not you see it if you went down in the compartment there and the opening was three or four inches wide and six or seven feet long.

A. Why yes, you could see it if you looked right straight at it.

Q. Assume a man went down there to examine the scow before taking her out?

A. He would possibly see it; a man should see it if he went down there looking for a hole and trying to find it. He probably would find it.

Q. Now, captain, you have towed that scow. Where was the last tow you made with her?

A. I would not say. I have towed that scow so many times and it is just possible that I took her to Blakely. That is where she went the majority of times. Sometimes I have towed that scow directly from the Canyon Mill Company to the Skinner & Eddy Ship Yard.

Q. How did you find her, as to being seaworthy?

MR. GORHAM: I do not see how that is material. It is sometime prior to this accident.

Q. You had towed her many times, up to three or four weeks before the accident?

A. Yes, many times.

Q. You may answer the question.

A. Well, as far as being seaworthy, the scow was in good condition, I would say to take a load at anytime.

Q. Did you ever have any trouble with her?

A. No sir, never had trouble with that scow.

Q. On this particular night of December 12th, or the night on which this scow was being towed by the Pacific Towboat Company tug *Defender,* were you out in the waters of Puget Sound?

A. I left Port Blakely sometime during the night; I do not remember just the exact hour. I went away that night with a scow.

MR. GORHAM:

Q. With which scow?

A. Another scow, one of the other scows. I was going to Everett that night and it was blowing quite hard, I should judge somewheres in the neighborhood of 20 miles an hour, possibly more. And when I got up to Edmonds I noticed lumber all over the water, and lumber from there to Muckilteo. I was steering myself and I had to dodge that lumber. Pieces all over the water, and I went on up to Everett that morning, and got there about four or five o'clock in the morning, I believe, if I remember right.

Q. Was the water on that night such as would make it dangerous to tow a scow such as the *Claire* loaded with lumber?

A. I know with my tug I would not attempt to go out in a wind that was blowing at that time.

Q. You would not attempt to go out.

A. No. It would not be much use. I might be going backwards. I would not have power to pull against it without a load.

Q. How does your tug compare with the tug *Defender*?

A. The tug *Defender* is probably 150 horsepower, and mine is only a gasoline boat with 75 horsepower.

Q. Would you say the tug *Defender* would be able to handle a scow loaded as this scow was, on that night, when she was carrying about 290,000 feet?

A. Yes; she would be able to pull against the wind all right.

Q. If you had a scow, being an experienced tug boat man, if you had a cargo of lumber of the capacity as was being carried in this particular case. And this scow was taken first to the mouth of the Snohomish river, before you ventured out in the open to cross the Sound or arm of the Sound, what, if anything, would you do about making an examination of the scow to determine her condition at that time?

A. Well, if I had known the scow was all right when I left the river, if I could see the scow after I was out, was outside of the river, I would say the scow was all right, if I did not see a list in her. Immediately after a scow commences to take water she will take on a list. You will notice it right away, if it is day time. And if is night time, you could not see the scow and you suspicion she may be a little leaky, then we would always go and examine the scow.

Q. Are you familiar with the condition of the waters of the Snohomish river?

A. Yes sir.

Q. You get no sea there, do you?

A. No, there is no sea in the river proper.

Q. There is no wash, such as would interfere with the handling of the scow?

A. No sir.

Q. Assuming that the scow on arrival at Port Blakely showed that she had an opening in one side, a distance of approximately 10 to 12 feet in length, and about three-fourths of an inch on the inside, what would you say as to that scow being in seaworthy condition to go out in the waters of Puget Sound?

A. She would sink within two hours with a seam open like that and the swell running over the seam.

Q. Assume that a scow, being loaded as this scow was on that night, and being towed down the river, that she would strike the bank of the river while moving, would that have a tendency to open a place like that in the scow?

MR. GORHAM: I object. The conditions under which the maneuver is assumed to have been made, are not in sufficient detail to give the witness an opportunity to pass judgment on it.

A. Well, a man might run into the bank with that scow one time and not do any damage to her. Depends on the way he came in contact with the bank. He might have come in contact with the bank up against the soft mud and have no damage on the scow. Yet he might come in contact where there was a stump or something, and it would not take much of a punch to punch a hole right through the scow; a very light jar against one of the scows will punch a hole right through the plank.

Q. Do you know what the condition of the bank of the Snohomish river was, down Steamboat slough at that time along the route which this scow was being towed, with reference to there being any driftwood?

A. The banks of the river is composed of sand and mud and the banks of the river is lined with trees; and it seems the banks of this river or the whole body of land is composed of land that has been filled in there or built in there during the ages, and the banks are more or less filled up with stumps and roots and things; the whole bank is full of stumps and things.

Q. Are these roots and stumps which project out through the bank an impediment or dangerous to navigation?

A. Well, not necessarily unless there is an accident or something and he has reason to run ashore or bump into the bank.

Q. If you run into the bank then the stumps and roots would do more damage?

MR. GORHAM: I object. I am going to move to strike all your testimony because you do not heed our objections. I do not think it fair.

MR. RYAN: That question may be stricken.

Q. What effect would these stumps and roots and driftwood you speak of being in there, what effect would they have on a scow being towed there, assuming the tow ran into the bank?

A. That depends on where a man ran into the bank. He might run into the bank and run into mud. And again he might run into the bank and run slap bang against an old tree or stump that had been sawed off.

Q. If he ran against a root or stump how would that affect the tow?

A. Liable to punch a hole in the scow or tear it wide open.

Q. Did you examine this scow while she was at Port Blakely?

A. Yes sir, I did.

Q. What condition did you find her?

A. Well, I moved the scow from the dock over there to the beach. She was full of water, and put her alongside the gridiron or a bunch of piling on the beach there, a gravel beach, and she layed right in front of my house, and naturally I had the curiosity and wanted to see what had happened to the scow, and I went down there and examined the scow. I never made a thorough or close examination of the scow. I went up and looked at her. I saw several seams open and water running out. I went down when the tide was clear out and she was dry of water. The water came out through a hole in the scow. I noticed a seam open at one end and also several seams that were open at that time in making the examination of the scow. And when we looked at her I just supposed that scow had become full of water lying on the beach the force of the water inside had forced the corking out. That was what my attention was called to at the time.

Q. The scow being filled with water it will force a certain amount of the corking out in escaping from it?

A. Yes, sometimes it will push the plank off.

Q. But, did you observe any special place in the scow?

A. Yes, sir, I did. I noticed one place close to the bottom, bottom seam, and the seam was four or five feet the corking was out of at that time. And also, up close to one of

the ends, the water was running out of the scow, the scow was still full of water, and as she laid on the beach she had a little slope to her, and the water was down on one side and running out of that hatch. And also out of this seam at the corner, a big seam along about close to the bottom, about the middle of the scow.

Q. Did you examine the bulkheads and compartments?

A. It has been so long ago I don't remember just what it was, although I was there at that time.

CROSS EXAMINATION.

MR. GORHAM:

Q. When you have had scows belonging to the Canyon Lumber Company, from their mill to Port Blakely, that towage service has been performed at the request of the Dominion Mill Company?

A. No sir, I never towed any scows from the Canyon Lumber Company, that is the only cargo the Canyon Mill Company the Dominion—

Q. Your towage service was for the Port Blakely Mill?

A. Yes sir.

Q. In other words the Canyon Lumber Company chartered the scow of the Port Blakely Mill and instructed you to go and tow it and you performed the service.

A. No, that is not just the way it is there. The Port Blakely Mill, they have a lumber wharf they can get at, and they have bought large quantities from the Canyon Mill Company. In buying in such large quantities of lumber from the Canyon Mill Company, the Canyon Mill Company lets the Port Blakely Mill Company use their barges.

Q. They charter them and have them load them and then the mill—

A. They load the lumber there and the Port Blakely Mill Company hires the towing done.

Q. That is it, so that the vessel was under charter, the scow was under charter to the Port Blakely Mill?

A. Yes.

Q. You do the towing for the Port Blakely Mill?

A. Yes, that is the idea.

Q. Now when you say that she might come up against some of these stumps and punch a hole, you mean break the timbers?

A. Yes sir, if she came in contact with a stump and hit a plank in between the bulkheads, the plank would sure go.

Q. It would break it.

A. Yes.

Q. It would not be an opening of a seam?

A. Depends which way she came in contact. You might run a scow against a stump and come directly up against a bulkhead and it would not break the plank. Then it would have a tendency to spread something some place or open a seam up.

Q. What part of the scow would come in contact now?

A. If she came in contact directly in front of one of these partitions that is in the scow—

Q. At the end of the scow?

A. Yes.

Q. But if she came on the corner or at the side?

A. If she came on the corner or side, you have the same thing. You have the side that breaks in of the scow.

Q. And would you say it would punch a hole there?

A. It would if it hit between the bulkheads, beside the bulkhead.

Q. This is at the end?

A. Yes sir.

Q. But it would not punch a hole through her on the side?

A. Not if you were headed directly down stream. The scow head—the scow would not—she would butt up sideways against the bank.

Q. And the end would not be against the stumps on the bank.

A. Not necessarily, no.

Q. If the tug was made fast to her, the tug would control that maneuvering, would it not?

A. Well, he should keep the head end of the scow pointing down stream, unless he lost control of the scow.

Q. The chances are then that if she dropped off to the side of the stream because of any reason, that he would hit the side of the scow, if she is heading down stream?

A. If he hit the bank with the corner of the scow, then he has got to stop right there; and the current running at that time, after high water, the current running down stream, the scow turned around and came bump up against the bank sideways.

Q. That would force—

A. That would not have enough force, I should think, to hurt the scow any, the sides of the scow are very thick, probably six or eight inches thick.

Q. You have been along the bank there on the shore?

A. Oh, I have been up and down that river quite regularly since 1913.

Q. Have you been ashore?

A. Yes sir.

Q. Are you familiar with the right hand bank as shown by Petitioner's exhibit B?

A. Yes.

Q. That is a fair photograph of that country?

A. Yes, that is a very good photograph.

Q. And just beyond in the picture is the bend at which the steamer passed out of sight from the mill?

A. Yes sir, about a quarter of a mile from the mill.

Q. If she went ashore and could be seen by the men at the mill, she went ashore somewhere on the bank as shown by that picture? Is that right?

A. I don't know anything about where she went ashore or what point in the river.

Q. But if she went ashore before she got out of sight she must have gone ashore on the bank that is shown there?

A. Yes, if she went ashore on the right hand bank going down the river, she was in a bunch of stumps and brush there.

Q. How do you know?

A. Your exhibit shows that and I know—

Q. Is that in detail enough—

MR. RYAN: Let the witness finish.

A. Just as the picture shows, all full of roots and stumps and brush.

Q. Now as a matter of fact, is not that bank a lot of soft mud; some of these roots and stumps are up above the water line. Can you see anything below the water line there by that exhibit?

A. Not from the picture, you would not see below the water line.

Q. Then there is nothing to show stumps below the water line is there?

A. No sir, but I would state that if the scow came in contact with the bank, headed down stream, or if headed toward the bank, that scow has a shear on her or cut-away underneath, and it would be very apt to come in contact with the bank above the water line.

Q. Above the water line of the river on the bank?

A. Yes, above the water line on the bank, certainly.

Q. And what tendency would that have on that scow, loaded with 294,000 feet of lumber, could you tell?

A. Well, you might run into the bank a dozen different times and each time you would have a different effect on your scow. It all depends on what the scow would come up against.

Q. When you examined this scow over at Port Blakely

and saw a seam open three quarters of an inch wide, by how many feet long?

A. I did not say it was open three-quarters of an inch or how long it was. I said I noticed the scow had several seams open in different places, and what I believed at that time was that the corking had been forced out from the scow after she was put on the beach. That is what I thought at the time.

Q. You do not know anything about it?

A. I do not know what happened to the scow, whether she had been up against the bank or where she had been.

Q. But if she had been on the bank with what force would she hit it?

A. I don't know anything about that.

Q. Now the seam that was open, I think you said there was a seam open just below the guard?

A. Well, yes, on one corner.

Q. What corner was that, the corner where the name was, the name of the vessel on the end?

A. I would not say; I do not remember whether I noticed any name on the scow or not at that time.

Q. I will show you exhibit D, which one of the witnesses for Claimant has marked showing where that seam was open at the end. And it shows there that that end of the scow has the name *Claire* across it. Does that recall to your mind where you saw the seam, with reference to that name?

A. No. I would not recollect, that does not recall anything to my mind with reference to where the seam was open. Because I did not know that name was on the scow at that time in the same place it is now. That scow might have had the name changed. I did not take notice of where the name was in regard to the seam.

Q. You remember there was an open seam near the bottom?

A. Yes sir.

Q. On the same side with the other open seam?

A. Yes sir, it was on the offshore side and down close to the bottom.

Q. How many planks from the bottom?

A. I think that seam was the first one from the bottom, that would be whatever these planks width was. If it was a 12 inch plank, it would be 12 inches from the bottom.

Q. At the top of the plank?

A. Yes.

Q. The oakum was gone?

A. Water was running out of there in a stream wide as your hand and six or seven feet long there. You must re-

member that scow was corked down there before they returned her, and these seams fixed up before they returned her to the mill. Probably these people never knew about that.

Q. Before she was returned to the Canyon Mill Company?

A. Yes sir. She had to be, so that they could tow her back.

Q. What was the condition of the hatches when you made that examination?

A. The hatch covers were all gone. She had been towed around in the storm that night. Some were hanging by their chains; these hatches are fastened on to the scow with short pieces of chain. Some of these hatches were gone, had been torn off and washed away.

Q. And others remained?

A. Others were hanging there. I remember when I put the scow on the beach some of the hatches were floating.

Q. No hatch in place.

A. I don't know whether any were in place or not; I would not say.

Q. Could you tell what amount of corking had been done on these hatches?

A. It would not show, if there happened to be corking it would all float away.

Q. Now the hatch cover sets inside of the coaming of the hatch, doesn't it? And it sets down on a little offset?

A. Yes, that is the idea.

Q. How far below the hatch coaming does the hatch cover set?

A. On this particular scow the hatches are about two feet and a half of three inch material.

Q. The hatch covers?

A. Yes sir.

Q. But they might protrude some above the hatch coaming?

A. They come down flush on to the deck of the scow.

Q. Two inches or two and a half, you say?

A. That is the thickness would be where the hatch is placed on the scow, it is a little bit higher than the deck of the scow on this particular scow.

Q. The coaming comes up around?

A. A little frame work there that the hatch cover sets in.

Q. There would be how much space for corking there, perpendicularly I mean?

A. The thickness of the hatch cover.

Q. You came out of Port Blakely that night at what time?

A. I do not remember but I think I left at one o'clock.

Q. With a scow in tow?

A. Yes.

Q. And you were running before the wind?

A. Yes sir. Took me about three or four hours to get down.

Q. You were bound to Everett or Muckilteo?

A. Bound for the Canyon Mill Company.

Q. When you got a little beyond Everett you got into this lumber adrift?

A. Up here at Edmonds, half way to Everett.

Q. I meant Edmonds. Now what was the condition of the weather there?

A. It was blowing a gale of wind at that time.

Q. You do not call twenty miles a gale of wind?

A. That is a gale of wind if a man is trying to tow a scow up against it.

Q. You had the wind with you, you had a fair wind?

A. Certainly. It would not affect me, only help me out a little, I had an empty scow.

Q. As a matter of fact the scow *Claire* would stand up against that wind as long as the tug?

A. Not necessarily.

Q. Now I am wanting your opinion as an expert; you are a steamboat man?

A. Well, if you want to know what I would actually do in a case of that kind—

Q. I did not ask you what you would do. I ask you as an expert mariner, whether or not that scow *Claire,* loaded as she was, would stand up against the storm as well as the tug *Defender*?

A. No sir. I would have been hunting shelter; I would not have gone out in that.

Q. You would not with your gasoline boat.

A. I would not attempt to tow when you had a high wind like that.

Q. You do not know what the wind was when he left, do you?

A. I know it was blowing all that night.

Q. You do not know what it was at Priest Point, do you, when you were at Blakely? Do you know how strong the wind was blowing at Priest's Point, of your own personal knowledge?

A. Well, what I would believe—

Q. I did not ask you that, I ask you if you know?

A. I would not know, certainly not.

REDIRECT EXAMINATION.

MR. RYAN:

Q. You say you would not have gone out with a scow that night with the wind blowing as it was there?

MR. GORHAM: He qualified that by saying he did not know what wind was blowing.

A. I left Blakely that night sometime around one o'clock or may be a little later, and it had been blowing hard at Blakely and it was blowing hard when I arrived at Everett, consequently it must have been blowing all night at Everett the same as it was in Blakely when I left. So I would base my opinion from that that the storm was continuous throughout the Puget Sound District, that there was a strong wind blowing.

MR. GORHAM: I move to strike that as merely his opinion; he does not know anything about it and it is irrelevant and immaterial.

Q. Now you also base your opinion upon the experience you have had in navigating upon Puget Sound, do you, as to the condition of the weather for that night?

A. Yes sir, when it is blowing southeast or southwest wind at the rate it was blowing that night, it will blow approximately as hard at Everett as it will on the upper Sound here. But on other occasions I would say that I have left Port Blakely and went to Everett with the wind in the northerly direction and be blowing a light breeze in the upper Sound from the south; and you get to Everett and find it is blowing a different direction, and I would think may be the wind had changed and I would turn around and come straight back and still find the same direction of wind in the upper Sound, and yet it would be blowing in a different direction down there.

Q. On this particular night what direction was the wind blowing?

A. It was a southerly direction; I would not say whether southeast or southwest.

Q. But it is that kind of a wind you say, that your experience has taught you that you find the weather conditions quite the same at Blakely as they are at Everett?

A. Yes, at this particular time of year I would say it was blowing possibly at Everett as on the upper Sound here.

Q. And you say if you had been in charge of a tow of that kind in such weather as that, you would have sought shelter?

A. I would have tied up at Muckilteo; that is where I would have tied up.

Q. Does a tug of this kind carry any appliances for the purpose of saving its cargo in a storm of this kind, in the way of pumps?

A. Well, sometimes steamboats are equipped with siphons and when they find that a scow is leaking they try to get shelter to siphon her. But a man would never, out in weather a night like that, towing on a night like that, know whether she was leaking or not. You cannot see the scow.

Q. Could not they have gone aboard the scow and put a pole down the siphon hole?

A. A man in towing a scow, he generally has it anywhere from 300 to 500 feet of tow line fast to her. And he starts out knowing or considers she is seaworthy, and he tows on and he don't go back to see whether she is leaking or not, unless he ties up and he would not have known. If he suspicions the scow is leaking he would go to shelter with her.

Q. Did you observe the weather on that particular night sufficiently to state when the wind first came up, what time of night the wind came up?

A. It has been so long ago now; I don't know when the wind started to blow.

Q. You left Port Blakely at what time?

A. Somewhere around one o'clock.

Q. It was blowing at that time?

A. Yes, it was.

Q. Can you tell how long before, or approximately before, how long it had been blowing before you left?

A. I would not state at the present time. All I know at the present time is that it was blowing when I left Blakely and I don't know whether blowing all night or not.

Q. Do you have a recollection as to whether the wind came up suddenly about one o'clock or had it come up before?

A. I don't remember about that.

Q. And in your opinion, with the wind such as you experienced on leaving Port Blakely, would you say that it made a sea such as was not safe to tow in?

A. It was not safe to tow that night, not with a loaded scow, that night.

MR. GORHAM:

Q. I understand you to say in all storms from the south on Puget Sound you have the same force of wind at Blakely that you do at Everett? That is your expert opinion as a mariner?

A. That has been my experience, when blowing a southerly direction a velocity of anywhere from 20 to 30 miles or more than that, that the wind carried right straight through the same force.

Q. It all depends on other conditions, the barometer and temperature, does it not?

A. Well, the way I understand the air proposition, that there is a low pressure off on the east coast or west coast of Vancouver Island, or away up in Bering Sea, and you have your rush of air to that low pressure, and the consequence is that throughout all the country lying on this side of the low pressure, you have the same force of wind or approximately the same.

Q. Then it would extend from a thousand to two thousand miles to Bering Sea? That is your experience, is it?

A. Yes.

Q. How many years have you navigated in Bering Sea?

A. I never have been on Bering Sea. I did not say anything about that, I said—

Q. —What you understand.

A. What I understand about the wind, through different reports, or what the weather bureau states, it will be blowing 20 miles at Cape Flattery, and probably be blowing 10 or 15 in here.

Q. Might be more or less than at Cape Flattery? According to the pressure inside, is it not?

A. You had your low pressure from Bering Sea some place.

Q. What do you mean by low pressure?

A. Low pressure—what is the cause of atmospheric pressure?

Q. What do you call low pressure, not what causes it but what do you call low pressure? What would be the reading of the barometer on what you call low pressure?

A. Well, the barometer may read anywhere below 30 and you might get a storm.

Q. I did not ask you that question. What do you call low pressure. You have been talking a good deal about low pressure?

A. Everybody who reads the papers where it states low pressure off Vancouver Island or some place—we don't have to know what low pressure is, or what causes it to become low pressure, but we know there is such a thing as low pressure.

Q. That is all you know about it?

A. Yes.

Q. And you are advised by the Weather Bureau of that fact that there is low pressure region.

A. Yes.

Q. Now would the barometer reading be the same at Blakely as it was at Everett?

A. That would not make any difference in it in 30 miles.

Q. Do you mean there would not be any difference in the reading?

A. All these barometers we have here, they register storm warnings within a hundred miles radius, and the consequence is that all barometer readings within that 100 miles radius will read approximately the same; that is the way I understand it. I may be wrong.

Q. If your barometer was rising at Everett on this night, how about it at Blakely?

A. It should be rising at Blakely.

Q. Would you call that a low pressure?

A. I don't know anything about what a barometer has to say about low pressure, the reading for low pressure; I don't know in what relation the barometer has to low pressure.

Q. You do know that the weather charts show the direction of the wind one day and the next day it is in an entirely different direction?

A. Yes.

Q. There must be a time in that 24 hours when it changes?

A. Yes.

Q. Don't blow continuously in one direction for a thousand or two thousand miles at the same rate?

A. If they had low pressure the atmosphere would be traveling to that low pressure. Not necessarily.

Q. Same rate of speed all the way through?

A. It should. I want to qualify—

Q. Between Blakely and Everett?

A. Yes, that would be my contention.

MR. RYAN:

Q. You stated you had been on these waters how many years?

A. I have been working on the Sound since 1909.

MR. GORHAM:

Q. Do you make a distinction?

A. When I said working I meant engaged in the operation of boats.

MR. RYAN:

Q. What about a scow, such as the *Claire,* does she have any stern or bow, that is in marine use?

A. Not by tow boat men. But she has a technical bow and a technical stern, as far as the Customs House is concerned, about placing the name of the scow, it says the name shall be placed across the stern of the scow. When that name is placed on there, the way I understand it, that would be the stern of the scow.

Q. Do your men always tow the high end ahead?

A. Yes sir, that is the idea.

Q. Then this scow had the same construction at each end and could be towed either way?

A. Yes.

Q. Then do you know whether or not any attention was paid to what might be the bow or stern by the tow boat men in handling the scow?

A. Only through the way the scow was loaded. At other times some fellows would take hold of the scow in the most convenient way, if she did not have very much difference in the load, they would hook on either end, if they were loaded at a place where they could not get at it very easy, they would hook on whichever end was most convenient to get hold of.

MR. GORHAM:

Q. You spoke about ascertaining whether this scow leaked or not. How does the water run from the outside compartments to the interior compartments, when the water gets into the hold of the vessel, if it runs from the outside compartment to the inside compartment?

A. You mean if the water goes into the scow?

Q. How it goes from one compartment to the other.

A. These bulkheads in that scow have limber holes cut in them so that the water will pass from one partition to the other.

Q. How many limber holes will there be for the full length of the scow?

A. In the construction of the scow they may not cut holes into them, but they may be put in later.

Q. You do not know how they did with the *Claire*?

A. No, I do not. I believe there is limber holes in this scow. I have been in there many times.

Q. If she was down by the head, or down by one end, when she was loaded, that water would not run freely through the different compartments?

A. The water would all be gathered back to one end.

If she had six inches of water, and she had a six inch rake, the front end would be dry; and probably back a little ways you could see the water in the scow.

Q. If she was tipped a little the water would run down.

A. You have the water all at one end.

Q. How far back would these limber holes be from that end?

A. Limber holes naturally extend through the vessel.

Q. How many limber holes would there be?

A. On both ends. And then these bulkheads are not corked and the water would run through any place.

Q. What is the dimension of the timbers in the bulkheads?

A. Depends on the construction of the scow.

Q. 12 inches?

A. Some 8x12.

Q. A twelve inch timber, what would be its dimensions?

A. 12 wide and say 8 inches the other way.

Q. Now 12 wide, that would be upright?

A. Yes.

Q. You would have to have 12 inches of water in there before it would go over that?

A. If they didn't have limber holes.

Q. You are speaking about it running through the bulkheads. She would have to have 12 inches of water before it ran over them?

A. Yes, if there were no limber holes.

(Witness excused.)

STAFFORD WILSON, recalled, testified on behalf of Claimant as follows:

MR. RYAN:

Q. Mr. Wilson, after corking down the hatch covers as you have testified, did you fasten them in any other way?

A. Yes, we always take a 20 penny spike and put in four spikes and bend them over.

MR. GORHAM: I move to strike the answer as not responsive to the question.

Q. Did you in this particular instance?

A. Yes.

Q. You have heard the testimony and queries of counsel for the Petitioner, with reference to the limber holes being in the partitions of the scow?

A. Yes.

Q. Were there limber holes in that scow?

A. Yes.

Q. How many?

A. There is four. There is one in every partition, in each end.

Q. Where are they located?

A. Well, the gunnel of the scow. You see this gunnel sets on the bottom; and it is cut out about 8 inches long and about four inches high, and the bottom plank sets right over, and that leaves a hole right there on the bottom of the scow, on the first timber.

Q. So that water could pass from one compartment to the other.

A. Yes.

(Witness excused.)

W. F. OLDENBURG, a witness called on behalf of Claimant, being duly sworn, testified as follows:

MR. RYAN:

Q. Where do you live?

A. Everett.

Q. What is your business?

A. Gas engineer.

Q. As such have you ever handled any tug boats?

A. Yes.

Q. What tug boat?

A. I have worked for the Ainsworth & Dunn Packing Company in Blaine for six or seven years; and several different other outfits.

Q. How long have you been navigating the waters of Puget Sound?

A. Ten or fifteen years.

Q. How long in the capacity of captain of different tug boats?

A. About six or seven years at Blaine.

Q. And have you navigated such tugboats in and about the vicinity of the mouth of the Snohomish river, between there and Everett?

A. Once in a great while we did a little, but not very often.

Q. Are you familiar with the barge *Claire* owned by the Canyon Lumber Company?

A. Yes.

Q. Were you so in the year 1918?

A. Yes sir.

Q. Did you have occasion to tow that scow any time during the year 1918?

A. Yes sir.
Q. From the mill of the Canyon Lumber Company?
A. Yes.
Q. When was the last time, prior to the date of December 12, 1918?
A. The trip before she made that one to Port Blakely.
Q. And how long before that trip do you know, just your best judgment? Was it a week?
A. I could not say to that exactly.
Q. Was it to exceed ten days, do you think, before this time?
A. Well, I could not say; somewhere in that neighborhood. I could not say.
Q. What kind of a sea did you have to make the trip?
A. We had nice weather that trip to Anacortes.
Q. And what condition did you find the scow in at that time?
A. All right.
Q. Did you have occasion to examine her?
A. Always examine a scow taking it on a long trip, to see that there is no water.
Q. You examined her on this trip you took?
A. Yes sir.
Q. You found her in good condition?
A. Yes sir.
Q. You towed her loaded, did you?
A. Yes sir. I do not remember how much lumber or timber there was on her. I know she went to the ship yard at Anacortes with all kinds of lumber on her.
Q. Did she take any water on the trip?
A. Not that I remember of.
Q. Has she taken water on any trips that you have taken her, that you remember?
A. Not that I remember. You pump some of these scows out once in a while. I would not swear whether I ever pumped the *Claire* out, or any of the rest of them or any particular one.
Q. Do you have any recollection of the condition of the weather in and around Everett on the night of December 12th, 1918?
A. No sir.

CROSS EXAMINATION.

MR. GORHAM:

Q. What was your position on this vessel?
A. Gas engineer.
Q. How large is that—the *Margaret S.*?

A. 58 feet keel.
Q. What horsepower?
A. 125.
Q. How long were you making the tow from Everett to Anacortes?
A. I could not say exactly. If I remember rightly we were laying to one of the buoys and waited for a few hours for the tide, and went right on through.
Q. Did you tow from Everett or the Canyon Mill?
A. From the Canyon Mill.
Q. Do you know of a tug having refused to make that tow from the Canyon Mill to Anacortes with that cargo, just previous to your towing her at that time?
A. No sir.
Q. You never heard of that?
A. No sir.

(Witness excused.)

CAPT. J. C. JOHNSON, a witness called on behalf of the Claimant, being duly sworn, testified as follows:

MR. RYAN:

Q. Where do you live?
A. Port Blakely.
Q. What is your business?
A. I am not a captain. Boat building and ship building.
Q. Did you examine this barge *Claire* on her arrival at Port Blakely about December 12th or 13th, 1918?
A. No sir. I examined her about the 25th or 26th of December, after she had been in Blakely sometime and was blown on the beach there.
Q. Just state what you observed as to her condition at that time?
A. Well, at the time I went down to examine this scow, there was three or four feet of water on the outside, at least 18 inches in the hold. I had a skiff and went all around the scow. And I found on one corner the oakum was out of there, and some seams were open at least three-quarters of an inch, for I remember sticking my ruler in there. It was not quite an inch but it was very near, probably three-quarters of an inch. I made my report three-quarters of an inch.
Q. How far back did that opening extend?
A. The oakum?
Q. How far did the opening extend?
A. From the end?
Q. Yes.

A. Well, it was a little ways inside the guard was tore off from the end and the whole of the oakum was out three feet long, and that is on the side of the scow. On the end of the scow on the same end, there was an opening but not quite so large; and I could see along this opening probably two feet that the oakum was out entirely and it was an open hole.

Q. Did you examine the partitions or compartments on the inside of the scow?

A. No sir, I didn't have no boots on at the time. And I looked down through the hatch is all, I had no occasion to look at the inside of the bulkhead. I was looking at the outside where the water might have gone into the scow. And I found that and I thought that was enough to sink a scow at the time she was out.

Q. In your opinion had this opening in the scow been caused by pressure from within or something from without?

A. That I could not tell. Most likely it had. The sea was so big and the oakum was loose, it would have come out very easy with the pressure of the storm, or anything from the outside would pull it right out.

Q. Well, this opening in the seam, could you tell whether or not it had been caused by something from without by the water striking it from without?

A. No, I could not tell.

Q. You do not know anything about that. You never operated a tug boat, did you?

A. No, not on Puget Sound anyway.

Q. Do you remember the condition of the weather on the night of December 11th? and the morning of December 12th, 1918?

A. No, I do not. I was only asked to make an examination and to make report to Mr. Mitchell, and I have that report right here. That is as far as I can go, because at the time I have forgotten about the whole thing.

Q. This is a copy of your report?

A. Yes sir.

Q. And this is the same as you have testified in this case?

A. Yes sir, and that is just what I want to testify now, all I know about it.

CROSS EXAMINATION.

MR. GORHAM:

Q. How far below the guard was the seam on the side?

A. It was probably four or five inches below the guard; it was 15 or 16 inches below the deck.

Q. Were there any seams open below that, near the bottom of the scow?

A. So much water on the outside I could not tell at that time; I went around in a boat.

Q. From your examination of the scow made at that time, can you tell whether she was a well constructed scow from the shipbuilder's standpoint?

A. Well, no doubt it was well constructed when she was built, but as I say, the scow had got to be quite an old scow and I think that the planks had pulled apart and caused this opening. I cannot tell how or when they were pulled apart, but they were pulled apart.

Q. What could have been done to prevent the planks pulling apart in the construction of the scow? Any drift bolts?

A. Yes sir, drift bolts.

Q. At that time?

A. Well, I did not examine how far the drift bolts went. The deck planks would cover the drift bolts.

Q. You found the deck planks rotten?

A. In places where the planks, you see there they get kind of worked down and the corners kind of broken off.

Q. Enough to take water in if awash?

A. Yes.

Q. Was there any indication from your examination of that scow at that time, that she was in collision with the bank of the river or some resisting mud with some obstruction in her navigation, that would cause her to open her plank?

A. No, I could not say that. Of course, an old scow like that there is more or less bruises on the corners all over. Bruise her when they strike the piling and the corners rub off.

Q. In other words she was a weak scow at that time, weak in construction.

A. I could not say that because I did not go into the scow.

Q. From what you saw?

A. I only saw this opening in it, and I would not care to say whether she was weak or not.

Q. How long have you been a shipbuilder?

A. I have been in business for myself four years, but trade as a ship carpenter since I was 18 years old.

Q. Wooden ships?

A. Yes.

Q. At Hall's ship yard for a long while, at Blakely?

A. No, I came to Blakely after Hall's Ship Yard moved

out of there. I was at our ship yards on the coast, most all of them.

Q. How did you find the hatches on this vessel?

A. I think my letter says two of them was most altogether; and the others were lying on deck—the covers.

Q. Could you tell whether they had been properly corked?

A. No, because they were all open.

Q. Could you tell whether they were of a construction that could be properly corked?

A. Yes, they could be properly corked.

Q. Could you tell how recent this plank had been sprung on this vessel, from your examination?

A. No, I could not.

Q. Was there anything to indicate it?

A. There was not. I suppose if I had gone inside and made an examination from there; but it might have been lately or might have been—I presume it could not have been very long, because they could not load her the way she was; but I don't know.

(Witness excused.)

MR. RYAN: I offer in evidence letter dated February 10, 1918, signed by G. N. Salisbury, Meterologist in charge of the United States Weather Bureau, Seattle, Washington. Which is admitted to be the testimony of said Salisbury if present in court and testifying under oath in this case.

Paper marked Claimant's Exhibit 1, filed and returned herewith.

MR. GORHAM: You admit, by your stipulation that the tug *Defender* at the time of this towage service, was in all respects properly tackled, appareled, supplied, manned and equipped with a full complement of officers and seamen aboard, and being in all respects tight, staunch, strong, seaworthy and with sufficient power to perform said towage service, and that the damage complained of was done, occasioned or incurred without fault on the part of the Petitioner, and without its privity or knowledge?

MR. RYAN: We admit your right to limit liability. I don't want to admit by that that she was properly manned. That would stipulate away our right.

MR. GORHAM: We still might have been negligent. But your stipulation waives proof on the part of the petitioner—

MR. RYAN: I will not go any further than the stipula-

tion would compel me to go, and I will not enlarge that. I think you have a right, under the stipulation, to limit your liability.

MR. GORHAM: If though, it was with privity and knowledge, we cannot limit our liability. That is the very essence of the limitation of the liability statute. If the owners have knowledge of these things we cannot limit liability.

MR. RYAN: I realize that.

MR. GORHAM: We do not mean to say that the servants and agents of the owners have been negligent.

MR. RYAN: That is my understanding, and we will have to offer proof here and let the stipulation speak for itself. I don't want to enlarge it.

MR. GORHAM: I would have been more specific in my allegations, is all, in the form of my stipulation.

MR. RYAN: I am not looking for technicalities, but I don't want to put myself in a place where I might be technically foreclosed from any proof I might be entitled to.

PETITIONER'S TESTIMONY.

CAPT. JOSEPH PERKINS, a witness called on behalf of Petitioner, being duly sworn, testified as follows:

MR. GORHAM:

Q. Your business?
A. Steamboat captain.
Q. How long have you been a steamboat captain?
A. About thirty years, I think.
Q. Were you a steamboat captain in December, 1918?
A. Yes.
Q. You remember the loss of the lumber on the scow *Claire,* when the *Defender* had her tow, that month? Do you remember of talking with Percy Ames about it?
A. Yes, sir. Just hearsay. I didn't see it. I did not see the lumber spilling.
Q. Did you see the tug and the scow at the mouth of the river, Priest's Point?
A. Yes sir, I saw her at Priest's Point, out to the dock.
Q. How close to her were you?
A. As near as I could judge about four or five hundred yards.
Q. Did you take particular notice?
A. Yes.

Q. Did you speak them at all?
A. No sir.
Q. You came up the river?
A. No sir, going down.
Q. What was the condition of the scow at that time, as far as you could see?
A. She seemed to be setting on a level keel all right, as far as I could see.
Q. Were they working the pumps?
A. Not as far as I could see.
Q. What time of day was that?
A. I could not remember now.
Q. In the afternoon?
A. I think it was in the afternoon about three o'clock, as near as I can remember, but I could not say for sure.

(No cross examination.)

(Witness excused.)

HERBERT JEFFRIES, a witness called on behalf of the Petitioner, being duly sworn, testified as follows:

MR. GORHAM:

Q. What is your business?
A. Steamboat master.
Q. How long have you been a steamboat master?
A. I have been master for the last four years.
Q. You were master of the tug *Defender* in December, 1918?
A. Yes sir.
Q. Do you remember the occasion of towing the scow *Claire* loaded with lumber from the Canyon Lumber Company mill, Everett, Washington, from the mouth of the river and thence towards Blakely?
A. Yes.
Q. December 11th or 12th, 1918?
A. Yes.
Q. State whether or not at the time, the *Defender* was in all respects properly tackled, appareled, supplied, manned and equipped?
A. It was fully manned and had all the equipment required by law, and everything capable of handling the work she was supposed to do.
Q. She was tight, staunch, strong and seaworthy in all respects for the service for which she was about to perform, when she commenced this towage service?
A. In all ways she was that night.

Q. Was she in all ways seaworthy?

A. Yes sir, she was seaworthy.

Q. Did you have sufficient power to perform the towage service?

A. She had sufficient power to do any job that I hooked on to since I was on her.

Q. What was her horsepower, do you remember?

A. Well, that all depends what you mean, indicated horsepower or nominal horsepower?

Q. Indicated horsepower.

A. Indicated horsepower I think is about 150 to 175.

Q. Do you know?

A. I don't know exactly. I could not tell exactly. I am not an engineer and I cannot figure it.

MR. GORHAM: I have here, Mr. Ryan, a certificate of inspection.

MR. RYAN: That is all right.

MR. GORHAM: I offer in evidence certified copy of certificate of inspection in force December 11 and 12, 1918.

MR. RYAN: No objection.

Paper marked Petitioner's Exhibit E, filed and returned herewith.

Q. I wish you would state what happened when you went to the Canyon Lumber Company and took this scow *Claire* in tow and went down the river with her. Just begin when you went to the Lumber Company there, their mill there and describe how you made the scow fast to your tug; how you took her from the dock and how you maneuvered down stream until you went out of sight of the Canyon Mill Company?

A. When I went up to the mill, the first thing I naturally do would be to look amongst the scows and see where the scow *Claire* was. And I found her lying along the dock and I found her at this dock.

Q. As shown on exhibit A?

A. Yes sir. I noticed the name on the upstream corner of the scow *Claire,* and I went alongside the scow.

Q. Would you call it astern—was it in behind the dock?

A. She was all in behind the dock. The high end of the scow was up stream when I looked at her, and I made fast alongside of her and took her on my starboard side, that is, looking up stream, on my right side, and I pulled the scow out of there and started down stream and I got a little way into—

Q. Which way, straight down?

A. Down Steamboat Slough. I could not go down the main river because the railroad bridge was out of commission and I could not get under there. I started down Steamboat Slough, and a little ways down there the lines of the boat were slacked—

Q. Was she alongside?

A. The boat was alongside the scow. And the lines got slack and I had to stop and tighten them up, so that she would handle the scow better. And while I was maneuvering around getting my lines tight, the scow made may be an angle of 45 degrees across the river. She was not exactly at right angles across the river; may be an angle of 45 degrees, something around there. When I got my lines tightened up I started down the river, and tied up at Priest's Point. I tied up at Priest's Point at one o'clock in the afternoon.

Q. What was the tide when you left the mill?

A. Top of high water.

Q. And slack, was it?

A. It was slack water, yes.

Q. What current in the river is there at slack water?

A. Well, it all depends, if there is a freshet on the river it will turn ahead of time sometimes, it may be thirty minutes after high water, and you could shove a raft of logs around there with a 50 horsepower gas boat. I proceeded down the river to Priest's Point and tied up there, on account of weather conditions. When I came up there and got that scow weather conditions did not permit going through, but I came and got the scow on that tide or I would have had to wait 24 hours for another tide. And I took her out there until I got to Priest's Point and tied up at Priest's Point about one o'clock in the afternoon. I looked over the scow again and she looked all right. I did not see anything wrong with her. And I went and called up the office and Horrocks was in the office at the time—

MR. RYAN: I object to any conversation had with Horrocks.

A. It was to notify him that I was there, and stopping there, that is all. It was the general custom of business when you stop anywhere to notify your owners why you stopped. And I laid there from one o'clock in the afternoon until 11 o'clock at night, and the tide being right I pulled out.

Q. What was the condition of the wind and sea that night at Priest's Point?

A. At the time there was no sea. There was no sea that a man would stop with a scow. There was a little chop but nothing to amount to anything, you would not stop.

Q. You mean at Port Gardner Bay?

A. Yes, at Port Gardner Bay. There was a light southeast wind. There was not any wind that a man would have to stop with a scow. If you stopped in weather for a scow like that, you might as well go out of business with tow boats.

MR. RYAN: I move to strike that part of the answer.

Q. About what was the gauge of the wind?

A. I would not say more than 15 or 20 miles an hour, if it was that much.

Q. What was your glass that night at that time, 11 o'clock?

A. The glass, if I remember right, was something between 29 85 and 30; about 29 90, to be more exact.

Q. State whether or not the glass had been going up that afternoon subsequent to your arrival at Priest's Point with the scow?

A. From the time I left the Canyon Mill the glass had a tendency to rise slowly.

Q. And when did it reach its highest point?

A. Well, it was at its highest point at 11 o'clock when I pulled out.

Q. Now when you left the Canyon Lumber Company's mill, did you have any trouble with your bridles?

A. I put a bridle on first with the intention of taking her away with a bridle and tow line, first, and my bridle broke, the rope parted.

Q. When did it break with reference to being away from the dock, or right at the dock?

A. Right at the dock; the scow had not moved yet.

Q. And afterwards you made her fast alongside and pushed out into the stream?

A. Yes.

Q. And maneuvered on down. Did you come in contact with the bank before you got out of sight of the Canyon Mill Company?

A. No. Never came in contact with the bank at any time. The only trouble when you are alongside the scow is you shove ahead and there is a tendency to shove sideways to a certain extent, but the tail end of the scow load rubbed the tree limbs that overhung the bank of the river, that is, the load, the load of lumber on the scow.

Q. Would you have known if the scow had come in contact with the bank at this place?

A. If the scow had come in contact with anything I certainly would have known it. You take a loaded scow and if it comes in contact with anything that has a tendency to stick, it will break the lines of the boat. I can explain the

way we have the lines. We have one line coming back to the corner of the scow, that is the line you pull on. Then you have another line leading from the front bow across the scow to the tug that is coming behind; and got another line leading from the nose of your boat that leads up a little ways on the scow. These are the lines you steer by. This line leading aft you push her along, and if she comes in contact with anything it will break that line every time, don't make any difference how big the line is.

Q. Was the line broken at this time?

A. No.

Q. Would you have known on the tug whether or not the scow came in contact with the bank, if the blow or contact or impact was sufficient to raise the guard of the scow when she was loaded?

A. Most certainly would.

Q. Who told you about the scow at the Canyon Mill Company?

A. Well, I don't know who it was, whether Ames or who it was. I went up there and I saw it was the *Claire,* and I hollered to the dock, Is this scow ready for Blakely? And somebody said yes, she is already to go. So I hooked on and started out with her. That is the scow I was sent for, the *Claire,* and that is all I know about it.

Q. What was her condition as she was on the gridiron or in her berth there, as regards general conditions, regarding seaworthiness, as far as you know, at that time?

A. Well, at that time I tied up alongside the scow and what I could see of her, that is her deck and hatches, which was very little you could see, and getting the lines on to the scow so as to take her out, I had to climb over on top of the load to get on the far side, you could not walk around the scow, as the hatches were covered with the load, I just assumed that the hatches were in good condition on the scow; she looked in good condition all around, what I could see of her.

Q. You did not take occasion to sound her, to sound the pumps on her?

A. We sounded the scow at the mill; we pulled the plug out on the side of the scow for siphoning and put a pole down there and there was three or four inches of water. There is not much use to put a siphon in on that amount of water, the siphon will not lift it.

Q. Which end, as she lay in her berth, which end of the scow did you put the siphon in?

A. In the light end; that is where I would have put it if I had put the siphon in; I sounded to see what water she did have.

Q. When you got down to Priest's Point, did you sound her again?

A. No, I didn't sound her again, but she was apparently in the same condition as when I left the mill.

Q. On an even keel?

A. Just a slight bit on one end, that was the upstream end; that is the side there was a name on, the upstream end of her. That is the only place I could see a name when I went up alongside the scow at the mill.

Q. How about the end?

A. I could not see that, there was a dock there, and you cannot see from the pilothouse of the boat, you could not see right under there. The only place I could see the name of the scow was on the side.

Q. She seemd to be well loaded and stowed?

A. Well, yes, as the ordinary lumber scow is loaded; she was loaded just about the same as the rest.

Q. If she had been seaworthy would she have weathered any storm your tug would weather?

MR. RYAN: I object as calling for a conclusion assumed in the question, a condition which is not shown or proven in the testimony at the present time.

A. Yes, she should, if the scow was a good tight scow, hatches corked, deck tight, she should have outlived any weather that the *Defender* would go through. Of course there is such a thing if a scow gets out in a sea she will work; if a scow works, if she is an old scow and the plank anyways soft like that, she will puke the corking out of her seams herself.

Q. After you left Priest's Point and went out to sea, starting to Port Blakely, that was at what hour?

A. At 11 o'clock at night.

Q. How long after that was it that the scow got into trouble?

A. Well, it was between 5 and 5:30 in the morning we lost the lights on top of the load of lumber; they disappeared; they went out of sight. And I turned the boat around to see where the lights had gone, see what was the matter that the lights had gone off the top of the load; they are either blowed out or something the matter. I went back to see, and we looked at her, and the scow was badly under water, and the best part of the load was gone; just a kind of a pyramid of pieces, that was all there was on her at the time.

Q. What could you do then?

A. I could not do anything but remain along with the scow; the scow was beyond any power I had to float her. She was afloat with what load there was on her. I pulled

for the first place where I phoned and notified McNealy of the situation.

Q. You remained by the scow?

A. Yes, I stayed with the scow.

Q. How long did you remain by the scow?

A. I stayed with the scow until she was delivered to Blakely.

Q. She was delivered to Blakely the following day that she had lost her load?

A. No, it was five o'clock in the morning when I found the load gone, and we towed up outside of Ballard about eight, not being certain of my time, but approximately about eight in the morning.

Q. That was December 12th, 1918?

A. That was on the 12th of December, if it was the 11th we left. I am not certain of the date. And I think it was about nine or ten o'clock on the night of the 13th that we left the pier outside of Ballard. I had tied up to the dolphin there to obtain shelter from the southeast wind, and I went into Blakely and it was about 12 o'clock at night; it was about midnight of the 13th.

Q. What did you do with the scow?

A. Towed in to the dock and notified the watchman, he was the only man around there; notified him who I was and what I brought in and where it came from.

Q. While she was lying in shelter before you went to Blakely had you and the tug *Defender* assisted in salving any of the lumber, or was that a separate operation?

A. That was a separate operation. I did not have anything to do with that.

Q. After you tied her up at Blakely, you came away, did you?

A. Yes.

Q. Your towage contract was finished?

A. My towage contract was finished.

Q. Now, when you left Priest's Point, was the scow in the same condition as when you arrived there in the afternoon?

A. This scow was apparently in the same condition. You could not see any change in her. I walked around the side of her along the outside of her, with a light, to see if there had been any change, see which was the high end or the low end, and see whether she had gone down any at the low end.

Q. How much freeboard did she have when you left Priest's Point.

A. Oh, I should judge the thickness of the guard, 12 inches, with a plank, about 26 inches, may be less. 26 inches

high on the high end, and about 20 or so on the low end. Just about six inches difference in the two ends.

Q. How extensive has been your experience in towing on Puget Sound?

A. I have been towing on Puget Sound since 1911.

Q. What class of towing?

A. With logs and scows, practically the whole time.

Q. And how far toward sea did you go?

A. Oh, I have towed only scows between here and Union Bay, British Columbia, or even to Ladysmith, Vancouver.

Q. Is the month of December a reasonably good month in towing scows in this country?

A. You would not call conditions bad, no, in the month of December. Conditions are not bad for scow towing. It is not good, either; it is fairly good weather, you might say.

Q. How about short hauls?

A. Take chances on that practically any time with a scow.

Q. Did the lumber come over the ends of the scow as it was loaded?

A. Yes.

Q. How far did it extend over the ends of the scow?

A. Well, maybe two or three feet.

Q. Both ends?

A. Both ends.

Q. Was that lumber raised a little above the floor of the scow?

A. No.

Q. Was it right on the floor of the scow?

A. Right on the floor of the scow.

Q. No hatches available at all?

A. No hatches that you could see.

Q. Did you look at both ends?

A. Yes sir.

Q. Did you hit anything coming down the river from the Canyon Lumber Company's mill to Priest's Point, on that voyage?

A. No, I am positive I hit nothing. The only thing, as I stated before, that lumber hit the limbs of the trees, on the stern end.

Q. Neither the scow nor your tug came in contact with any obstruction?

A. No.

Q. On that little voyage from the mill to Priest's Point?

A. No sir, we did not come in contact with anything to notice, to do any damage; if we had it would have showed some effect by 11 o'clock while lying at Priest's Point.

Q. When you came down at 2 o'clock in the afternoon, why did you not go out then?

A. The weather conditions was too bad. The weather conditions when I left Everett were not fit to go with the scow; but she had to get out of there to save 24 hours delay. The next full tide was not high enough to float the scow.

Q. When you left there to go with the scow?

A. Yes. The weather conditions were not fit to go with the scow, not outside of the river, but we had to get away from there or have 24 hours delay.

Q. That is why you went out at that time?

A. That is why I went out at that time, because the high tide after I left Priest's Point at 11 o'clock, that tide was not big enough to float the scow off the grid iron.

Q. What was the general direction of the wind that night?

A. Southeasterly wind.

Q. Any one on the scow?

A. No.

Q. Is it usual for anybody to be on a lumber scow?

A. Well no, it is not a usual thing. Some of these bigger scows have men on, but very few of them.

Q. Scows this size don't?

A. Scows this size haven't any men on them.

Q. Now, where were you on the tug when you were going down stream from the Canyon Lumber Mill?

A. I was in the pilot house. There was one man on top of the load to watch the bank on the other side.

Q. You heard Mr. Harcher's testimony here with reference to the weather always being the same at Blakely and Everett, didn't you?

A. Yes.

Q. State what your knowledge of that condition is?

A. Well, you take along from the middle of November, along until in March, the wind is very variable; you cannot tell. Now only just yesterday I was going down to Everett with the boat light—

Q. With a southerly wind?

A. Southerly wind yesterday, and I left here at 12—Port Blakely, no wind here in the bay when I left here, and when I got as far as Edmonds, the wind freshened southeast, and when I got into Everett and it was not fit to leave Everett with a raft of logs. And the night before I came down Hoods canal and there was quite a breeze of wind at Point-No-Point there, southeast, and when we got to Seattle there was no wind. And lots of times you will find it southwest wind up here along around Bainbridge Island, and across the Sound here you frequently have a westerly or

northwesterly wind. Different seasons of the year, you take the summer days, mostly westerly winds.

Q. Now the statement of Captain Salisbury, Meteorologist, in evidence in this case, says that December 11th was cloudy with some light rain, low and level barometer, and nearly normal temperature. A general south wind prevailed shifting at times to southwest or southeast. Highest velocity was 30 miles an hour from southwest at 1:23 p. m., and the average hourly movement was 18 miles per hour. That includes the variable wind during the 24 hours?

A. Yes.

Q. That is what you mean by variable winds?

A. Yes.

Q. And this highest velocity 30 miles at 1:23 p. m., to some extent coincides with your statement that at Priest's Point you tied up because the weather was not fit to go?

A. Yes.

Q. There was no storm warning?

A. None at Everett.

Q. For December 11th?

A. No. These other places, I don't know; there might have been some place else.

Q. No storm warning at Seattle, according to his testimony. How long a tow line did you have when you left Priest's Point for Blakely?

A. About 500 feet, I should judge; pretty close to 500 feet.

Q. Have any trouble with the tow line?

A. No, not any trouble with the tow line.

Q. Now, when you found her lights were out, and you went back to her, did you shift the lumber on to that?

A. No sir.

Q. Did not you have occasion to shift the lumber on her?

A. No sir, did not shift any lumber until tied up to a dolphin outside of Ballard.

Q. What was the position of that?

A. Oh, we got it so it put her more on an even keel. It was more to even the lumber up, and so there would be more of a chance of floating her to Blakely and saving what there was.

Q. Were you detained anywhere on the river, after leaving the mill before you arrived at Priest's Point?

A. No sir.

Q. On this voyage?

A. No sir.

CROSS EXAMINATION.

MR. RYAN:

Q. Captain, when you started out into the stream, your lines were not tight then?

A. Yes, when I tied up alongside of the scow, first, my lines were tight.

Q. I understood you testified as you went down stream you tightened your lines?

A. Yes.

Q. What was the occasion of your tightening them?

A. The occasion is, just after you take a piece of line and make fast, you hook on and make fast here and as you pull out you will develop quite a little slack. That is something we expect. You make fast alongside the scow like this and you put your rudder over, and it has a tendency to bring a heavy strain on the line, pulling the scow out with it, and it keeps working back and forth and it will gradually slacken up and you will have to tighten all the time.

Q. When you stopped to tighten your lines then she drifted in the stream some distance?

A. Yes. I backed up on the boat, stopped the headway of the scow to a certain extent.

Q. What is the width of Steamboat Slough there?

A. Well, I should say it is about 225 feet. You can get about three rafts of logs through there.

Q. Is it navigable the entire width?

A. Yes, Steamboat Slough is the most navigable slough there is going up the river to the city of Snohomish. The old river is pretty much covered with bars, although you have more room there.

Q. What is the width of the scow?

A. About 32 feet, I think.

Q. And the width of your tug?

A. 22 feet beam.

Q. Then there was plenty of room for you out in the middle of the stream to navigate the tug with the scow at her side?

A. Yes, plenty of room.

Q. She did drift into the bank so that the trees struck her load as she went down?

A. As I left I had to make this bend shown in this picture (Exhibit C). It shows you the extent of the bend. This is Steamboat Slough, going down there. That is a very clear picture of Steamboat Slough. Where these piles are, there is a cut through there called Union Slough, but it is not navigable. And here is the old river over here going down that way and as far as you can see. That is the

extent of the bend. And the mill sets right across on this bank facing right down the slough. That gives you a clear picture of the slough.

Q. Then you did bear off to the—that would be the north bank of the slough and you got so close to that that your load scraped on the trees as you went along?

A. The aft end of the load.

Q. How long were you standing in the stream crosswise or at an angle of 45 degrees?

A. Oh, I should not judge more than five minutes at the outside.

Q. And you say that if you struck the bank with the scow your lines would break?

A. Yes sir, the line I was pulling on would break.

Q. If that line was not tight it would not break, would it?

A. Yes sir.

Q. Would not there be some slack—

A. If the line was not tight it would have a greater tendency to break. It would break quicker. You would have the boat going ahead and the scow coming back at the same time.

Q. You would have some time in which to slack your boat?

A. Not if your man is up on top of the load. I cannot jump down on deck from the pilot house if I saw the scow going to hit.

Q. Could not you slack up?

A. I cannot slack the boat without slacking my line and hold the boat there.

Q. Did you have a man on top of the load going down?

A. Yes, had a man right on top of the load.

Q. You made no examination of the scow then, before you made fast to her?

A. Not before I made fast. I pulled up alongside and as I made fast and backed her out.

Q. And you took her in just whatever condition she was left there for you?

A. Yes.

Q. And it was in good seaworthy condition at that time, was it not?

A. I assumed that, from what I could see of the scow and the way she was loaded.

Q. And she was properly loaded, too?

A. Well, yes, as far as scow loading goes, I guess she was loaded pretty good.

Q. Now you went down to the river to the mouth, and you arrived there about 11 o'clock?

A. No, about one o'clock.

Q. About one o'clock in the afternoon. Then you made fast and waited until 11 o'clock that night?

A. Yes.

Q. What is the ordinary length of time of towing from the mouth of the river to Port Blakely, how many hours would it take you ordinarily to make it?

A. You mean a scow or raft of logs?

Q. A scow such as you had in tow at this time.

A. Oh, I should judge, with the prevailing weather conditions it would not take any more than about eight hours.

Q. What did you have to determine the weather conditions at that time, did you have a barometer?

A. I had a barometer.

Q. You say it was a rising barometer; barometer then rising?

A. Yes.

Q. Then would weather conditions, or effect upon the barometer be quite the same at that point that it would at Seattle, ordinarily?

A. Well no, I would not say it would, ordinarily.

Q. Would you say then that the barometer readings would be different?

A. It might read a couple of hundredths different, something like that.

Q. That is practically nil, is it not, nominal?

A. Yes.

Q. They are about the same between Seattle and Everett?

A. No, not quite the same.

Q. Probably two hundredths?

A. There is some variation.

Q. What is that variation in the barometer reading, give your judgment as to what that variation would be, between Seattle and the point where lying?

MR. GORHAM: At this time?

MR. RYAN: At any time.

A. That variation always depends on the gage of the glass, the gage of your barometer. I have been lying in port some place waiting for weather, and another boat would come in and I would ask him how his barometer read, and I would read mine and it would read different, right in the one place, one boat tied alongside the other. And one glass will be a shade lower or higher than the other.

Q. What is the difference in the glasses?

A. It might be the glass here in Seattle might read lower than mine in Everett, and if you put them both in

the same place, might read the same or a little different.

Q. Now before you left this point, you telephoned in to your—

A. Into Everett.

Q. You did not telephone to Seattle, did you?

A. Oh, no; telephoned the office in Everett.

Q. And in that office, did you inquire anything about weather conditions in Seattle?

A. No.

Q. You just relied entirely upon the reading of your own glass there?

A. Reading my barometer and my own judgment.

Q. Now you said you had a rising glass there at that time?

A. Yes, rising slightly.

Q. That reading is different from the reading of Mr. Salisbury in charge of the Weather Bureau in Seattle. You have read this report, haven't you?

A. I haven't exactly read it. I have heard it read, it said something about a level glass.

Q. That is what it reads. I will read it to you, just that part of it. "December 11th, 1918, was a cloudy day with some light rain, low and level barometer." That is not what you have been testifying? You testified yours was a rising barometer?

A. I testified to a slowly rising glass.

Q. That would be the opposite to a low and level barometer.

A. No, you could have a low glass and still have a tendency to rise slowly. It could be away down to the bottom if it wanted to.

Q. But there is no rising if it says it is a low, level barometer?

A. That is according to his reading.

Q. Then your reading differs from the reading of Mr. Salisbury, does it not?

A. Slightly.

Q. And "A general south wind prevailed, shifting at times to southeast or southwest. The highest velocity was 30 miles an hour from the southwest at 1:23 p. m., and the average hourly movement was 18 miles per hour." Now what velocity of wind would you consider blowing in that direction, might be a little dangerous to take a tow out, such as you had at this time?

A. Well, there is a whole lot in the size of your sea. Depends on the stage of your tide. If you have an ebb tide running out from Everett against a thirty-mile southeast wind, you will have a pretty good chop, but if you have a

35 or 40 mile wind with a flood tide blowing into Everett, you probably would have no sea at all. And at this time with that southwest wind blowing the tide was ebbing and ebbing good and hard, and the sea made a pretty good slop out on the flats and I decided to stay at Priest's Point.

Q. Now on December 12th. You stayed until midnight —11 o'clock?

A. Yes.

Q. December 12th, only an hour after you left, you say you noticed a change in your glass after that time?

A. No, I did, up to that time.

Q. Was that when your glass read highest?

A. Yes, during that 24 hours.

Q. December 12th was a cloudy day with light rain, low fluctuating barometer, and temperature above normal. A general south wind prevailed, at times from southeast. Highest wind velocity 34 miles an hour from south at 10:45 p. m. Average hourly velocity or movement 19.4 miles. Southwest storm warning displayed at 8 a. m. for ensuing 24 hours.

MR. GORHAM: Let the record show you are reading from Salisbury's statement.

MR. RYAN: Yes.

Q. Now did these weather conditions prevail in Everett at your point of starting with this boat?

A. At 8 a. m. in the morning?

Q. No, 12 o'clock.

A. Those weather conditions did not prevail at 12 o'clock. It don't say so in your letter.

Q. Here is the velocity, highest velocity 34 miles an hour and average hour velocity 19.4 miles. Had you any way to take the velocity of the wind?

A. No sir.

Q. And what wind would you assume you had when you started?

A. From Priest's Point?

Q. Yes.

A. Well, moderate breeze, oh say 12 miles, may be 15 miles an hour.

Q. And how far had you gone before you discovered the scow was swamped?

A. About 18 miles, as far as Richmond Beach.

Q. What portion of the distance from the point you started to Blakely?

A. Taken from the point I started from the Canyon Mill, I was two-thirds—

Q. I mean from Priest's Point.

A. Well, I should judge four-sixths or two-thirds; a good half, a big half; three-fifths, that would be a little closer.

Q. And the usual time of taking a tow from Priest's Point to Blakely is how many hours?

A. Oh, about eight hours.

Q. Did you keep a log book on this trip?

A. Yes.

MR. RYAN: Will you produce that log book?

MR. GORHAM: Yes. Let the record show that Petitioner submits log to counsel for Claimant.

Q. What did you enter in this log?

A. This is the form of the company, more of a work sheet, what I use it for. I usually keep the details and such like, in a course book; giving the courses, time on different trips. But I have been using this more as a job book, to keep the time I arrive and the time I leave, and I put down there the conditions of the wind and glass and the number of hours run, etc.

Q. This is rather a work book which you have submitted to me which I have?

MR. GORHAM: Work memorandum.

A. Work memorandum; the majority of things that happen on the job.

Q. Now you also have a course book that you keep?

A. Yes sir.

Q. Will you produce it?

A. I cannot. The books are not turned into the office. That is a thing I keep, my own, so I can find my way around here in the fog. This boat was laid out in Lake Union for over a year, and it must have been on there. Then she was in the ship yard and they pulled her to pieces.

MR. GORHAM:

Q. You mean since December, 1918?

A. Yes. There is nothing on her.

MR. RYAN:

Q. Captain, you turned your course book over to your employer, did you?

A. No, left it aboard my boat; that is my own property.

Q. Now is it not a fact that you had that course book at the time of the trial of this other action in Kitsap county?

A. No sir. That is what I told you before, in your

office, that I didn't have it, and didn't know whether we could find it; the boat was at that time laid up, and I told you that right in your office.

Q. And in your course book you say you kept a complete log of weather conditions?

A. Yes sir.

Q. Hourly?

A. No, not hourly; may be two hours apart.

Q. How frequent would you make entries in your course?

A. About every change of watch; about every six hours.

Q. Who made the entries in your course book?

A. I did. If the mate was on watch he made his own.

Q. Who was your mate at that time.

A. This fellow over here.

Q. Do you know what entries he made in that time?

A. No. Just made about the time he passed Muckilteo light.

Q. Are these entries in your handwriting?

(Showing paper marked Claimant's Identification 2, to witness.)

A. Yes sir.

Q. When did you make these entries?

A. On the same date, December 11th.

Q. They were made at that time, were they?

A. Yes sir.

Q. Now from this entry, which I will read from Claimant's Exhibit 2, there is an entry dated "23:00" which means 11 p. m., the time you left Priest's Point with the *Claire?*

A. Yes.

Q. You have entries to the right "Stiff. S. 29-80."

A. 29-80 is the barometer.

Q. That is not high?

A. That was 13 o'clock; that is 1 o'clock.

Q. Then didn't you make an entry of the barometer reading?

A. No, 12 o'clock glass.

Q. At 12 o'clock you were at the edge of the flats.

A. Yes, about two miles out from Priest's Point.

Q. A very short distance.

A. Yes.

Q. You could have turned back readily from there?

A. Yes sir.

Q. Did you take a barometer reading then?

A. Yes.

Q. What is your barometer reading then, at that time?

A. 29-86.

Q. What would that indicate with reference to the weather?

A. A rising glass would indicate the weather was fair for that time of year.

Q. And on the 12th "06 Highlands Abeam" what do you mean by that?

A. 6 o'clock. That is the Highlands down here half way between Richmond Beach and Meadow Point.

Q. And what is that notation you have there?

A. Fresh easterly wind.

Q. How much of a rise was there in that glass from 11 p. m. to midnight?

A. A slight rise.

Q. How much would you call a slight rise?

A. Oh, four or five or six hundredths. Four or five hundredths.

Q. And a rise of that much would indicate how much of a change in wind velocity?

A. Oh, not a great deal.

Q. Would it be noticeable, captain, at all, a change that you might expect with a change of five hundredths?

A. No, you would not look for much change. Probably the atmospheric pressure is rising, and the glass has a slight tendency to stay as she is or get a little better with your glass rising.

Q. Then, when you arrived at one o'clock in the afternoon what was the state of the wind blowing, from the southwest?

A. Yes.

Q. Between one o'clock p. m. and 11 o'clock p. m. how much of a change was there in your glass?

A. Oh, just raise, slight raise.

Q. It made a slight rise?

A. Yes.

Q. Now you probably could not notice the change in the velocity of the wind, if you depended on the reading of the glass?

A. Oh, I depend on my judgment a little bit. I don't go solely on this glass. I can tell whether the wind is blowing forty or five miles.

Q. Every navigator does depend on his judgment. You looked out and in your judgment it was all right to go, and you did not pay much attention to the glass.

A. I did pay attention to the glass, as I put it down there.

Q. But it is a very slight change from 29 80 to 29 86?

A. Six hundredths of a rise.

Q. That you call a "Stiff south." What do you mean, southerly wind?

A. Yes.

Q. Then it must have been blowing, according to the indications of the glass, a stiff southerly wind?

A. Certainly not. You are about 12 hours off; you are reading 12 hours beyond.

Q. I am reading the record of your glass.

A. Yes.

Q. Would not that indicate weather conditions about the same?

A. Yes sir. That glass would indicate it here; but you see you have to change from a stiff south to a fresh east.

Q. And then with that you just relied upon your judgment, what you observed, and went out?

A. What I observed in the condition of the sea and the amount of wind at that time.

Q. And you made no notation between one o'clock in the afternoon and 11 o'clock that night, as to weather conditions.

A. No.

Q. In this instance you knew you had a capacity of cargo, didn't you, of lumber?

A. The scow looked like she had a fairly good load on her. I did not know whether capacity or not.

Q. A very valuable cargo, was it not?

A. I don't know. I was not notified as regards the details of the cargo. I did not know whether a valuable cargo or a cheap cargo.

Q. You say it was lumber containing about 290,000 feet?

A. I don't know. I am no tallyman. I have no way of estimating a load of lumber. I don't know how much.

Q. You did not know what you might be carrying?

A. I don't know. You could tell me five hundred thousand feet of lumber on that scow and I would not be able to tell.

Q. How long have you been towing scows?

A. Not all lumber scows.

Q. You said you had been towing scows and barges of lumber.

A. I have towed scows of lumber and coal and pig iron and junk, barges of everything, and I have towed logs here for the last eleven years, here on Puget Sound.

Q. You do not want to get in the evidence the fact that you could not form an estimate of the number of thousands of feet of lumber you have on a barge?

A. As a matter of fact I have no idea how much lumber there was on that scow.

Q. Had you ever towed this scow before?
A. No sir.
Q. Have you done towing for the Dominion Mill Company, of Port Blakely, before?
A. Towed some logs for them.
Q. Never towed any barge? How many men had you aboard the boat?
A. Seven, with myself.
Q. You never observed anything wrong, never made any investigation until you saw the lights go out?
A. That is the natural thing, that is done—
Q. That don't make any difference. Answer the question, yes or no?
A. No.
Q. Then you went back to your load and it was gone?
A. When the lights were gone I went back and looked at it and the load was gone.
Q. How frequently did you make entries in the course log?
A. You put down your course, time and weather; sometimes at every point you get your time for running, in case it should be foggy, you would have it when you run over that course again, you know how long it took from one point to another, when you change your course.
Q. Did not you consider this quite an important voyage that you made?
A. No more important than any other.
Q. When you were attempting to tow that scow with ten thousand dollars worth of lumber in the scow, didn't you consider it enough of importance to make a note of it in your log book or on your work sheet, either one?
A. Oh, I considered it as far as notifying the owner that the scow was doomed to get in with what I could. That is all that I knew I could do.
Q. And you got in and you turned that log of courses over to the owners, did you?
A. No. I turned this over to the owners.
Q. And you left the log courses on the boat?
A. Yes.
Q. On the tug?
A. Yes.
Q. Did you make any entry in your log book what you did in the way of trying to salve this?
A. I didn't do nothing in the way of trying to salve it.
Q. You did nothing at all?
A. Well, I say that the load was gone. There was nothing that I could do, only pull in what I had and get where I could save what was on the scow.

Q. When did you first notice any change in the weather conditions after you left Priest's Point, that indicated that the sea was getting prety rough?

A. Oh, maybe around Edmonds, somewhere about there.

Q. You could have put into Edmonds could you not, there is a good place to anchor there?

A. No, there is no good anchorage.

Q. You could have gone in and gotten away from the storm?

A. I could have gone in if I considered the weather bad enough to go in with that scow, which I did not.

Q. You had nothing to do whatever with the salving of this load?

A. No.

Q. Did you telephone from Priest's Point to the office of the company?

A. In Everett, yes.

Q. At Priest's Point.

A. Yes.

Q. Did you have any discussion at that time as to weather conditions?

A. Mr. Horrocks was in the office there and I told him I was tied up at Priest's Point, did not figure it was fit to go and he says, is there any water in the scow and I says there is about three or four inches in her and cannot move it with the siphon. I said we are tied up here at the dock and we are going out of here on the tide if the weather permits, and he says all right.

Q. He could have reached you by telephone, could he, at Priest's Point?

A. Yes.

Q. Did you telephone him again after that?

A. No.

Q. And he knew about what time the tide would be high at the point you refer to, in your conversation with him over the telephone?

A. Yes sir.

Q. And you heard nothing further from him at all?

A. No.

Q. The Everett office is a branch of the Seattle office here, is it not?

A. Yes sir.

Q. Did you have any directions from the head office with reference to weather conditions, directing you to go out that night, or not to go out?

A. No.

Q. When you have a tow in charge?

A. No. You call up and they say all right, storm signals up, or the wind is blowing here or there is no wind here; and use your own judgment, stay there and don't go out or lose anything.

Q. Did you inquire if there were storm signals when you telephoned to the office in Everett?

A. No. I had only left there three hours before that and there were no storm signals then. It takes the weather bureau about 12 hours to notify anybody of the weather they are going to have, by signals.

Q. In other words the weather bureau is very inefficient?

A. I notice that the storm signals always seem to go up after the wind quits blowing.

Q. So you do not really pay much attention to reports from the weather bureau?

A. You pay some attention to them, but you don't make it a life and death proposition to hang your whole business on the weather bureau. You have to use your own judgment.

Q. You never made inquiries as to what reports the weather bureau had made as to the probable weather conditions when you telephoned the office in Everett?

A. No.

Q. Just told them you were tied up there on account of weather conditions, and then went out that night on your own volition?

A. Yes, on my own judgment.

Q. That is at 11 o'clock?

A. Yes.

RE-DIRECT EXAMINATION.

MR. GORHAM:

Q. Captain, does the reading of the barometer indicate the gauge of the wind?

A. You mean velocity?

Q. Yes.

A. No.

Q. And you could have a barometer 29 80 at one hour in the day with the wind at a certain velocity, and you could have the same barometer reading six hours later and the wind a different gauge, could you not?

A. Yes.

Q. How was the sea at the time that you discovered the light on the scow had gone out?

A. Oh, there was a fairly good sea on. There was no sea that scow should not have lived in, the scow should have gone through in that weather.

Q. Have you taken scows through similar seas before?

A. Yes, a whole lot worse than that, from Union Bay to Seattle.

Q. Many times?

A. Many times, loaded just as heavy with coal.

MR. RYAN:

Q. The change of the barometer does indicate a change in weather conditions, does it not?

A. Yes, probably within the next twelve hours.

Q. And the velocity of the wind is very apt to change with the change in the weather conditions, is it not?

A. I want to make this plain. You mean weather conditions?

Q. A change in the glass reading on the barometer, would lead you to expect changes in weather conditions?

A. Yes, within the next twelve hours.

Q. Change in the weather conditions means what?

A. May be either good or bad. If your glass is rising you will have good and if the glass is falling you usually get bad.

Q. And if it is low?

A. If it is low, at different times in the year—it all depends. You take a high along in August, June, July, you will get a glass as high as 30 40, and you will get half a gale that you could not lie at the docks.

Q. But the wind, you expect it to vary with the change in weather conditions to either good or bad?

A. Yes.

MR. GORHAM:

Q. This was a normal glass for December?

A. For that time of year, yes. You will find the glass down at that time. Very seldom goes much above 30.

MR. RYAN:

Q. There is one thing I overlooked. You say that in the month of December is an average month as far as weather conditions are for towing?

A. Yes, fairly good month.

Q. What do you consider one of the worst months for towing?

A. Right now, the month of March is about the worst month in the year.

(Witness excused.)

MR. GORHAM: I offer the identifications for Petitioner in evidence.

MR. RYAN: I also offer my identifications in evidence.

TESTIMONY FOR CLAIMANT RESUMED.

WILLIAM W. MITCHELL, a witness called on behalf of Claimant, being duly sworn, testified as follows:

MR. RYAN:

Q. Where do you live?
A. Seattle, at present.
Q. What is your business?
A. Lumberman.
Q. By whom are you employed?
A. Dominion Mill Company.
Q. What capacity?
A. Manager.
Q. How long have you been acting as manager of the Dominion Mill Company?
A. Manager and assistant manager since July, 1918.
Q. You were acting as assistant manager in December, 1918, were you, at the time this lumber was carried?
A. Yes sir.
Q. It is admitted here by stipulation that there were 1,085 pieces of lumber loaded aboard this scow *Claire,* and that there were 185 pieces, totaling 46,022 feet, which were delivered at Port Blakely from that scow. That there were 900 pieces, totaling 248,206, which were lost from the scow. What was the value of that lumber that you lost, the 248,206 feet, the fair market value of it, or value for your purposes?

MR. GORHAM: Which one do you want?

Q. I will put it this way: For what purpose were you buying this lumber?
A. For export.
Q. Had you a market for it at that time?
A. Yes sir.
Q. What grade of lumber do you export?
A. The highest grades out of the logs.
Q. Can you market in your export trade any lumber that has been damaged in any way on these orders?
A. No.
Q. Now for your export trade what was the value of this 248,206 feet of lumber which was lost?

MR. GORHAM: We do not admit it was lost.

MR. RYAN: I understand that.

A. I will have to refresh my memory on the value, values have changed in the last two or three years. I should say, off hand, $7500 or $8000.

Q. Then the value of this quantity of lumber was between seven thousand five hundred dollars, the quantity of lumber that was lost?

A. I would say roughly I would not care to bind myself to that exactly, without refreshing my memory as to the value at that date. I think you have the exact notes on that here.

Q. Here it is. (Handing paper to witness.)

A. According to this H list it would be about $27.00 or $28.00 a thousand feet. I should say in the neighborhood of $7,500.

Q. That would be of a value of $27.00 or $28.00 per thousand feet?

A. Yes.

Q. Did you ever recover any part of that? Or, was there ever delivered to the Dominion Mill Company any part of that, any of these pieces which were lost?

MR. GORHAM: I object to that because under their own pleading delivery was made to them at the Canyon Lumber Company. The towage contract is another thing. They bought the lumber there at the Canyon Lumber Company.

A. No.

Q. Did the Pacific Tow Boat Company ever deliver to the Dominion Mill Company any part of that, any portion of that lumber which was lost, any of these pieces?

A. No sir.

Q. Do you recollect anything of the weather conditions on that night of December 11th?

A. It was rather stormy around that time.

Q. You were in Port Blakely at the time?

A. Yes sir.

Q. The Dominion Mill Company was operated a party to case number 5170 in the Superior Court of the State of Washington for Kitsap County, for the value of this entire barge of lumber, were they not?

A. Yes sir.

Q. And you were obliged and did pay for the entire cargo of lumber, were you?

A. Yes sir.

CROSS EXAMINATION.

MR. GORHAM:

Q. The loss off the scow, out of that loss there was some 834 pieces salved and taken to Everett, were there not?

A. I don't know.

Q. Were you not so advised?

A. No, I was never advised as to the number of pieces.

Q. You were advised that the lumber, that there was some of it at Everett?

A. There was some.

Q. Were you asked to come to get it?

A. I cannot recollect at this time.

Q. Were you not advised that lumber was not in condition to tow in a raft, under the weather conditions prevailing shortly after this accident?

A. I believe that was my information.

Q. So that in order to transport to Blakely they should have to put them on the scow, is that right?

A. Well, all depends on the weather conditions.

Q. Assuming the weather conditions—

A. Assuming the weather conditions for what period of time? They were lost in December, what time would that spread over?

Q. I am spreading it over whatever time you are spreading it over. I don't know the facts.

A. I cannot remember. It was away late in the spring that the lumber was salved.

Q. You are not claiming any damage for the cargo that was delivered to you at Blakely, are you?

A. No, I don't believe we are.

Q. And what would be the measurement of 834 pieces, approximately, for the 900?

A. I will have to refresh my memory on that.

Q. For the 900 pieces, 248,206 feet. What would the 834 pieces measure that were saved?

MR. RYAN: We are not admitting they were saved.

MR. GORHAM: I am asking.

A. It would be about $6,900.

Q. I ask what would be the measurement of the 834 pieces?

A. About 18,000 feet.

Q. That is what I mean by average. One piece might contain 200 feet and another 500 feet. What would they average, the 834?

A. It runs about 275 feet to the piece.

Q. How much would the 834 pieces? That is a matter of computation. You say that is worth about how many thousand dollars? About six thousand dollars?

A. It would be about $7,000.

Q. That would be the export value; what was the

market value on Puget Sound of 834 pieces? You say the export value would be about $7,000, if it had been in good condition?

MR. RYAN: I object as wholly immaterial.

A. What you are trying to get at is the value, not export value?

Q. Yes.

A. Mr. Gorham, that is a very hard thing to answer. If you could find a market it might have been higher than the export. I have seen times that the market changes. You are carrying me back three years in the lumber business.

Q. You have been manager.

A. The market value of that same quality of lumber that same day was at least $28.00 a thousand.

Q. The market value for domestic purposes, not export, is that that you testify to that had a value of $28.00?

A. The market on Puget Sound was approximately $28.00 a thousand for that class of lumber.

Q. The export market price was approximately the same?

A. Yes.

(Further hearing adjourned until March 17, 1921, at 10 a. m.)

SEATTLE, MARCH 17, 1921.

Present: MR. GORHAM, for the Petitioner.

MR. RYAN, for the Claimant.

WILLIAM W. MITCHELL, on the stand for further

CROSS EXAMINATION.

MR. GORHAM:

Q. You were advised, Mr. Mitchell, that there were some pieces of this cargo which had been salvaged and taken to Everett, and there impounded in a boom, were you not, by the Pacific Towboat Company?

A. Yes sir. I do not remember whether it was the Pacific Towboat Company. I did receive that information that there was a certain amount of it salved.

Q. From whom did you receive that?

A. Mr. McNealy.

Q. And he at that time was manager of the Pacific Towboat Company?

A. Yes.

Q. What did you do with reference to the minimizing of your loss after you were advised that there was a certain part of this property that had been salved?

A. I went down and looked it over, that is, just gave them a casual look, and I could see from that that the material had been on the beach, and the corners were rounded and badly chafed, rock chafed.

Q. You mean the corners at the end of the pieces?

A. The corners at the side; the four corners around and the ends also.

Q. And to what extent, if any, was the lumber damaged from its former sound condition?

A. It was a total loss to us.

Q. Was there any salved value in it at all?

A. There possibly would have been a salved value in it, but it would have to be remanufactured.

Q. Have to be reconditioned?

A. Remanufactured, which would have cost as much as the original cost.

Q. In other words, what you call remanufactured, these pieces were in the boom at Everett, the expense on that would have been in excess of its value after it had been remanufactured?

A. You are wording that rather peculiarly. It would have been the total value of it. It would have lost the original sizes, to remanufacture it.

Q. I am not trying to put anything in your mind. I don't want your conclusions, I want the facts. You say it was a total loss to you as export cargo. But did not it have a salved value other than for export cargo upon remanufacture?

A. No, nothing. There would be nothing realized out of it after your remanufacturing cost.

Q. What would it cost per thousand feet to remanufacture it, approximately?

A. At that time our cost was running in the neighborhood—roughly, I would not say the exact cost—but would run practically the value of the stick.

Q. Twenty-eight dollars a thousand.

A. Yes. Another issue is we did not handle—possibly only from five to seven per cent of our total cut goes domestic, and that is all it would have been good for.

Q. Now if it had a market at all it had a salved value. Did it have a market at all?

A. After it had been reconditioned?

Q. Yes.

A. Oh, there possibly would have been a market for it

after it was reconditioned.

Q. What would have been that market value?

A. That is hard to tell. There was no domestic demand for lumber at that time. 1918 was a very low state of things. That was the year the armistice, you all remember that.

Q. Well, that was the year of the armistice, yes, but did not the market begin to rise the first of January, 1919?

A. No, the market did not recover until the first of August, 1919.

Q. How much of it showed this damaged condition, as you saw it there in the boom?

A. All that I saw in the boom.

Q. How much was there there, could you estimate?

A. Why, I didn't count it, but I was told around 120 to 200 pieces.

Q. In the boom?

A. In the boom.

Q. Were you advised at any time after that that there were further pieces salved?

A. No. That information was conveyed to me also by McNealy that there was 120 at one time, McNealy told me, and 200 another time, that was the last advice I received from him.

Q. What was the dimension of this stuff?

A. 6x12 and 10x12, I believe.

Q. And various lengths?

A. It was heavier than 6x12, I know that.

Q. What were the longest pieces and what the shortest?

A. It was about 100,000 6x12 and 120,000 10x12 and 70,000 12x12.

Q. What was the maximum length?

A. Forty feet.

Q. Minimum?

A. Sixteen.

Q. You engaged the Pacific Towboat Company to tow this scow from the Canyon Lumber Company mill on the river side of Everett, to Port Blakely?

A. Yes.

Q. And you arranged with the Canyon Lumber Company to deliver to you this cargo free on board their scow at Everett on the river side, with the use of the scow to transport the lumber from Everett to Blakely?

A. Yes, in a general way you have got it. I could not remember the exact wording of my order.

Q. You did not pay any additional sum for the use of the scow from Everett to Blakely?

A. That was considered in the lumber value?

Q. That was in the order value.
A. Yes.
Q. So that you took delivery of this lumber at Everett mill as between you and the lumber company?
A. On a safe carrier, yes.
Q. Who was the judge of the seaworthiness of the carrier, that is, of the vessel carrying it?

MR. RYAN: I object as calling for a conclusion.

MR. GORHAM: I will withdraw that.

Q. Did not your order call for the scow *Claire*?
A. No.
Q. Did you know that the lumber was to be transported or loaded for transportation on the scow *Claire,* at that time?
A. No.
Q. Is it your contention now that the *Claire* was not a safe carrier?
A. Is it my contention that the *Claire* was not a safe carrier?

MR. RYAN: I object to that. The evidence now shows what condition the scow was at the time she was loaded and turned over to the libellant for towing. And the only evidence that the witness could give, would be the conclusion reached from the testimony as now given. He had no personal examination of the scow after it was loaded as she was at once taken in possession by the Pacific Towboat Company.

A. In my opinion, from what I have been able to hear, she was in a safe condition at the time the lumber was loaded.
Q. I did not ask you that—

MR. RYAN: That is a perfect answer, I submit.

Q. I ask you if it was your contention that she was not a safe carrier?

MR. RYAN: I submit the witness is answering the question in the only logical way it can be answered. Were you through with your answer?

A. Yes.
Q. I want to know what your contention is. Is it your contention that the scow was not a safe carrier?

MR. RYAN: I submit the witness has answered.

A. I have already answered.

MR. GORHAM: We object to counsel putting the

answer into the witness' mouth. That is not responsive to my question. I insist that he answer my question.

MR. RYAN: I submit that I have made no effort to put an answer in the mouth of the witness, as to what it might or should be. And I further object to the form of the question that it shows plainly upon the face that it is a question which does not call for any competent evidence. That its only purpose could be is an attempt to place the witness in a position to testify to something with which he is not familiar except through the testimony as offered in this case. And he has already testified and he has already answered the question submitted to him by counsel.

MR. GORHAM: We might go on and pile up these statements of counsel and it would not get us anywhere. If you advise your client that he shall not answer the question, I will be content with that record; but I want an answer to my question as to what his contention now is as to whether or not the *Claire* was a safe carrier. If you advise him he should not answer, I will rest with that.

MR. RYAN: For the purpose of making our part of the record clear, counsel for Claimant makes no such admission and does not so direct the witness.

MR. GORHAM: I am willing that you should if you want to.

MR. RYAN: No, I am advising him to further answer the question if it is within his ability so to do. I am only making the objection and comment of counsel for the protection of the witness. I think the witness answered the question fully and logically. If the witness is in a position to give any further answer or further explanation, he is requested to do so at this time.

MR. GORHAM: I am not quarreling with Mr. Ryan. I think Mr. Ryan is acting entirely within his rights, except I think he did make a statement there which the witness might adopt as his own, which was put in his mouth and answered. I do not even insinuate that Mr. Ryan had that intention when he made that statement. I want to eliminate from the record any appearance of any quarrel between counsel and myself, because I do not impute counsel's motives at all in any respect. But we insist on an answer to the question. And if the witness says he cannot answer it, all right.

MR. RYAN: Counsel for Claimant accepts the statement of counsel for Petitioner in the spirit in which it is

given. And I also wish to place in the record, that at no time in making objections or comments, which are placed in the record, did he have any intention of suggesting to the witness what his answer might be, the witness being an intelligent man, acting now and for a long time past as general manager of this Claimant corporation.

MR. GORHAM: I concede that.

Q. Now, Mr. Mitchell, you know whether or not, on behalf of your company you contend that the *Claire* was a safe carrier, and I wish you would answer the question, Is it your contention that the scow *Claire* was a safe carrier or was not a safe carrier?

MR. RYAN: I make the same objection as offered before. The witness has already answered. You may proceed.

A. (Former question read to witness.) I have answered that by saying that from hearsay I considered the *Claire* a safe carrier at that time.

Q. When you entered this order with the Canyon Lumber Company, the full order was to be delivered on two different scows?

A. That was not material.

Q. What was the contract price of the order?

A. It was $24.00 based on H list. That according to H list at that time would make that run from $27.50 to $28.00 a thousand.

REDIRECT EXAMINATION.

MR. RYAN:

Q. Where are the mills of the Dominion Mill Company?

A. At Port Blakely.

Q. That is on tide water, is it?

A. Yes, it is on tide water.

Q. What is the business of the Dominion Mill Company?

A. Lumber manufacture.

Q. And what class of trade did they manufacture and sell for and to, generally?

A. Export trade.

Q. I believe you testified to the relative proportion which you manufactured for export and domestic trade?

A. Yes. Approximately 95 per cent export.

Q. And for what purpose had you bought this specially?

A. For export.

Q. I want to read into the record a copy of the order which was given by the Dominion Mill Company. We do

not seem to have the original here. Will you examine this and see if you recognize that as being a correct copy of the original order given the Canyon Lumber Company for this lumber in question?

A. It appears correct.

Q. Have you a correct copy of the order which you gave the Canyon Lumber Company for this bill of lumber?

A. Yes sir.

Q. Will you read that order, Mr. Mitchell?

A. (Reading) "Port Blakely, Wash., Nov. 21, 1918.

ORDER:

Canyon Lumber Company,
Everett, Washington.

No. 1 merchantable rough Douglas Fir lumber,
30,000 6x12, 16 to 32, loaded separate on scow.
75,000 6x12, 33 to 40, loaded separate on scow.
50,000 10x12, 16 to 32, loaded separate on scow.
100,000 10x12, 33 to 40, loaded separate on scow.
35,000 12x12, 16 to 32, loaded separate on scow.
35,000 12x12, 33 to 40, loaded separate on scow.

lumber to be graded as per H list grading rules. P. L. I. B. certificate to be furnished.

Lumber to be ready for delivery between the 1st and 5th of December. Lumber to be trimmed both ends. Price $24.00 H list, f.o.b. your scow, your mill. No charge being made for barge hire.

(Signed) Dominion Mill Co.
By Mitchell, assistant manager."

Q. That entire order was not loaded on the scow *Claire,* was it?

A. No.

Q. Such part of this order as you have previously testified was loaded on the scow *Claire*?

A. Yes sir.

Q. Did you have any talk with Mr. McNealy, the manager of the Pacific Towboat Company, at the time you placed the order for the towing of this scow, with reference as to how it should be moved and when it should be moved?

A. Not at the time when I placed the order.

Q. Did you at any time before the towing was done?

A. Yes sir.

Q. And did you have any talk with reference to the care that should be used?

A. Yes.

Q. Will you state what was said, and what you said to him?

MR. GORHAM: When and where and whose presence.

A. I don't believe there was any one present. Mr. McNealy and I were alone in his office in Seattle.

MR. GORHAM:

Q. Do you remember the day?

A. It must have been about the 10th of December, 1918. The weather was rather stormy and I think I said, I am a little afraid of the weather, but I need the lumber badly, but do not take any chances of losing.

MR. RYAN:

Q. What answer did McNealy make to that, if any? If you cannot repeat the words, give the substance.

A. I will have to give the substance, because Mr. McNealy has always worked—heretofore worked with us in order to arrange safe voyage. And, as I remember at that time he said that they would not take any chances if the weather was extremely rough. But he also recognized the fact, after my explanation of the ship being at Port Blakely on demurrage, that it was highly necessary that we get the lumber as soon as practicable to bring it over.

MR. GORHAM:

Q. Then there was pressure for immediate delivery a present necessity for immediate delivery, by reason of the demurrage charges running against the cargo, manufacturer or cargo delivery to the vessel?

A. There was urgent need of the lumber.

Q. For that reason.

A. Yes sir.

Q. And you were anxious to get the lumber, in order to avoid any demurrage charges that were not absolutely necessary?

A. Yes sir.

(Witness excused.)

G. N. SALISBURY, a witness called on behalf of Claimant, being duly sworn, testified as follows:

MR. RYAN:

Q. State your name?

A. George N. Salisbury.

Q. What official position do you hold?

A. I am in charge of the weather bureau of Seattle.

Q. Were you in charge of the bureau in December, 1918?

A. I was.

Q. What records are kept there with reference to weather conditions?

A. About as full records of the weather as could be kept on the instruments and our personal observations. We have the records of the barometer and temperature and wind and velocity.

Q. And you have here a letter, which has already been admitted in evidence as being what you would testify to with reference to the weather conditions here in Seattle on December 11th. Do you also have on file the weather reports of Everett, Snohomish County?

A. We have the records of Everett. They are kept as to temperature, rain fall, and the direction of the wind but not as to the velocity; no instrument for measuring the velocity at Everett.

Q. Is there any record of barometer readings at that time?

A. No record of barometer kept at Everett, but I have that record at Seattle.

Q. You have that included in this report which has been offered as Claimant's exhibit 1. Will you examine the records and state what the weather conditions were in Everett on the days December 11 and 12, 1918, as you took them from the records kept in the office of the United States Weather Bureau?

MR. GORHAM:

Q. Is that the original record?

A. This is the original record kept at Everett.

Q. In whose handwriting is it, the operator and observer there?

A. The observer there is David Olson; he is a school teacher.

Q. He submits original records?

A. He submits original records every month, records of temperature and rain fall and the direction of the wind and the state of the weather, whether clear, fair or cloudy. On these dates, the 11th and 12th, as far as the records show are identical with those at Seattle. There was rain on both dates, and the wind was from the south east and the weather was cloudy or rainy. That is about all the record shows as to the 11th and 12th.

MR. RYAN:

Q. From your report, what would be your opinion—I guess you have already stated in that report your opinion is that the weather conditions were the same in Everett as they were in Seattle.

A. I believe that they were.

Q. And that opinion would apply with reference to the barometer reading which you gave in your communication of date February 10th, 1919, which is now in evidence as Claimant's exhibit 1.

A. Yes sir, I believe the barometer would be the same, because the barometer is something that does not change much in a large district. Essentially the same all over Puget Sound. A little lower pressure towards the north, because that is really where the storm center is.

Q. Then, if anything, the barometer reading would be lower at Everett than Seattle?

A. If anything it would be lower, but not much lower.

CROSS EXAMINATION.

MR. GORHAM:

Q. The station at Everett is under your jurisdiction, is it not?

A. Yes sir, it is under my jurisdiction; I have the supervision of these records.

Q. You instruct them when to display storm signals?

A. The display station at Everett is something that is different. That is under the jurisdiction of the Portland office and the order for storm warnings are identical for Seattle and Everett.

Q. That is the invariable custom.

A. It is the custom, yes.

Q. And when Portland issues storm signals, the same order goes to Seattle and Everett.

A. It goes the same to Seattle and Everett.

Q. Examine that letter, please, which has been placed in evidence, and see if there is any indication of storm signal being displayed on the 11th of December?

A. The record of the Seattle office shows December 11th, was cloudy day, with some light rain; low level barometer; normal temperature. South wind prevailed, shifting at times to the southwest. Highest velocity 30 miles an hour from the southwest, and the average velocity was 18 miles an hour. It don't mention storm on that date.

Q. It would have mentioned it if there had been an order for storm signals?

A. If there had been one I think it would be mentioned.

Q. You see on the following day you mention storm signals, the 12th?

A. Southwest storm warning displayed on the 12th at 8:00 a. m. for ensuing 24 hours.

Q. From that statement you signed you are satisfied there was no storm signal order issued from Portland for the 11th.

A. There was no mention of it, therefore, I think there was none. There was no mention of it in our original record that I have with me.

Q. I wish you would refer to it.

A. If it was not mentioned it was not displayed. A southeast storm warning was ordered on the 10th at 7:30 a. m. and would remain up for 24 hours. That would take it into the 11th. There is no mention of storm warning having been ordered on the 11th.

Q. That storm warning signal would not have been displayed after the expiration of 24 hours?

A. Not unless continued by order.

Q. There is nothing in the original record of that date to show it was continued?

A. Nothing to show that the former warning was continued on the 11th, the order on the 10th was for 24 hours from 7:30 a. m.

REDIRECT EXAMINATION.

MR. RYAN:

Q. Would you have a notation in your records if it had been ordered continued, or would it just continue you?

A. If it had been ordered continued the record would be there.

Q. And was it automatically discontinued at the end of 24 hours?

A. Yes, it is, unless there is an order to continue it, we take it down.

Q. Can you tell from the records in your office and from your experience, under these weather conditions, what kind of sea it would be for making a tow?

MR. GORHAM: I doubt if the witness is qualified to testify, without a knowledge of the currents and tides.

Q. Have you such records that you could testify?

A. I just have a general understanding from towboat men, that a wind that is a little above 20 miles an hour, 20 to 25 miles becomes dangerous to towing, that is it becomes a hindrance, and with towing logs it will cause the logs to jump from the boom, the sea that is raised; it depends on how the sea has been in continuous action, if the wind should start up, it might be an hour or so before there would be enough wind to interfere with the position of the logs in the boom. The longer the wind continues—

Q. At that rate the more dangerous it becomes?
A. The more sea it would raise.
Q. And on the 11th of December, at about midnight, can you tell the velocity of the wind at that time?
A. The velocity of the wind at midnight on the 11th of December, at Seattle, was 13 miles an hour; that would be just midnight, from 11 to 12, and the direction is southeast; that is the time at the end of the hour the wind was blowing 13 miles.
Q. Give the velocity which was after that?
A. At 1:00 a. m. on the 12th, 15; next hour, 16; next hour, 15; next hour, 10; next, 8; next, 7; next, 8; next, 8.

MR. GORHAM:

Q. That is the windgauge record of the Seattle office?
A. Yes sir.
Q. On December 12th, 1918.
A. Yes sir.
Q. I will show you a paper which I will have marked identification F, and ask you if that is practically accurate as to the barometer reading at Seattle for the week ending December 16th, as compared with your records?
A. It is practically identical, as far as I can see. On the 10th and 11th the records are practically identical.

(Witness excused.)

PETITIONER'S TESTIMONY (Resumed).

CAPT. JEFFREY, recalled on behalf of Petitioner, testified as follows:

MR. GORHAM:

Q. Was there anything you could have done, to your knowledge, that you did not do, that would have avoided the loss of that lumber?
A. No. By the way the lumber was loaded on the scow, I done all that I could possibly do as regards to sounding her for the amount of water that was in her, and I used at that time, I would judge, all precautions regarding water and assuming what I could see of the scow that she was in good condition. I don't know that I took any unnecessary chances of losing the load of lumber.

CROSS EXAMINATION.

MR. RYAN:

Q. You did lose the load, didn't you, Captain Jeffreys?

A. I should judge it was from stress of weather or defective scow. All that I know, at 5:30 in the morning, the load was gone, but not through any misjudgment of mine.

Q. Then it was through stress of weather you say the load was gone?

A. I did not say positively through stress of weather. It might have been through stress of weather or defectiveness of the scow.

Q. But your first statement was that through stress of weather the load was gone at 5:30 in the morning, or five o'clock?

A. My statement through stress of weather or defectiveness of the scow, the load was gone.

Q. You don't know which it was then.

A. No.

Q. At what time in the morning did you discover the load was gone?

A. Between 5:00 and 5:30.

Q. You did not know at that time how long the load had been gone, did you?

A. I don't know how long part of it had been gone. I just know at that time the lights went off the top of the load where they were placed when we left.

Q. Did you see them at the time they went off?

A. Just about that time, or just a few minutes afterwards between times as you look back at the scow; when towing you look back at anything you are towing; and at night time we had lights to see if they are still burning.

Q. You did not see the lights go off?

A. I did not see them just exactly, at the minute.

Q. Were the lights made fast to anything on the scow?

A. You have an iron jack you drive into the lumber and then you lash the light on to this jack.

Q. Did you find the lights?

A. No.

Q. Never did find them.

A. No.

Q. You turned and went back at once and you found the lumber floating around?

A. Yes.

Q. And was she clear of lumber that was floating at that time?

A. No, there was a few pieces just floating away.

Q. The great majority of your load was back considerable distance, was it not?

A. It appears that way. You could not see back into the dark.

Q. So that it appeared as though the scow had dumped part of this load sometime earlier, didn't it?

A. Sometime previous I suppose.

Q. You had no trouble in going back right alongside the scow on account of floating lumber, did you? You had no trouble reaching the scow?

A. No, I had no trouble reaching the scow.

Q. You never did find where the lights had been dumped off?

A. No.

Q. So presumably these lights were dumped sometime before you noticed they were gone?

A. No great amount of time.

Q. What do you mean by no great amount of time?

A. Oh, I suppose not half an hour.

Q. How fast were you towing that night?

A. Oh, about two miles an hour.

Q. How far had you gone from the place of starting, Priest's Point, at the time you noticed the lights were gone?

A. Oh, I will say about maybe 16 or 17 miles, maybe 18.

Q. You were 18 miles from there and you had been gone how long?

A. Six hours and a half.

Q. And you were moving two miles an hour.

A. I said about two miles an hour. Maybe more or maybe less; all depends on the stage of the tide. Sometimes if you have the tide with you you can make four miles an hour. And with the tide against you you could not make two miles.

Q. How far is Muckilteo from Priest's Point?

A. The direction you have to come, you have to make two courses of it, you cannot come direct from Priest's Point to Muckilteo, you have to make a distance of five miles.

Q. You heard the testimony of the captain who came from Blakely that night to Everett, that he noticed or ran into a lot of floating timber off Muckilteo, didn't you?

A. I don't know that I heard him say Muckilteo, I heard him say sometime between the time he left Port Blakely and before reaching Everett, he ran into floating lumber, and he had to dodge it all the way along.

Q. Assuming it was Edmonds, how far is Muckilteo from Edmonds?

A. About 12 knots.

Q. You mean Edmonds is 12 knots from Priest's Point or Muckilteo?

A. Muckilteo.

Q. And Muckilteo is five miles from Priest's Point?

A. Yes.

Q. Now you had gone 18 miles, you say, when you lost the load?

A. Seventeen or eighteen.

Q. Where were you at that time?

A. About Richmond Beach.

Q. How far distant is Richmond Beach from Edmonds?

A. About three miles south of Edmonds.

Q. I believe you testified yesterday that the usual time for making a tow from Priest's Point to Blakely or Everett to Blakely is eight hours?

A. About eight hours depending on weather conditions and tide.

Q. What is the mileage, what is the distance from Blakely to Priest's Point?

A. Oh, I would say about 28 miles.

Q. Twenty-eight miles.

A. Yes.

Q. And what portion of the distance had you covered when you noticed you had lost your lights?

A. About 18 miles, 18 or 20 miles.

Q. And you were right off Richmond Beach.

A. Yes sir, just about there.

Q. You had been making about the same headway the entire trip after you left Priest's Point?

A. Well, just about. From Edmonds you get a heavy tide, the tide is different. You have a body of water coming down from Penn's Cove, Skagit River, Snohomish River from the bay inside of Whidby Island, comes down to Edmonds, and then meets a body of water that flows out of Admiralty Inlet toward Townsend.

Q. Ordinarily takes considerable longer to make the distance from Richmond Beach to Blakely than it does from Richmond Beach to Everett, don't it, going from Everett to Blakely?

A. No, when you get to Edmonds, you have a head tide at that time, and we had a head wind.

Q. Then how much longer would it have taken you to have gone to Blakely under those conditions?

A. I cannot be exact on that. The wind makes a difference on your tow and on the surface of the water. Lots of times you have a fair tide and you have a head wind and it affects the surface of the water considerably and consequently gives you a tendency to make head tide as well as head wind.

Q. Then you were making the best speed you possibly could that night, were you?

A. Yes sir, without driving anything to pieces, any machinery or anything like that.

Q. You traveled six and a half hours and made 18 miles.

A. Yes sir.

Q. And then it would have taken you how many more hours to make Blakely from where you were at the time you discovered the lights were out?

A. Not any more than about three and a half hours, something like that.

Q. Making about ten hours on the trip.

A. Yes.

Q. You stated you were making about two miles an hour?

A. I stated about two miles an hour.

Q. And 29 miles from Everett to Blakely.

A. Yes sir.

Q. That would have taken you how long?

A. I said that the average trip from Priest's Point to Blakely is about eight hours. If I had a northwest wind behind me and a fair tide from Everett, I would probably make it in six hours. If I have a head wind probably take me ten hours.

Q. And you think about the average trip is eight hours.

A. On an average in fair weather.

Q. What was the occasion of taking you so much longer this time?

A. I don't consider two hours—

Q. Never mind what you consider. Tell me why it was you were taking extra time on this trip.

MR. GORHAM: I object.

A. Had a little head wind.

Q. In other words you had bad weather.

A. Not bad weather, a little head wind.

Q. You were the captain of that tug were you?

A. Yes sir.

Q. Is it customary for the captain to be on watch from one until six o'clock?

A. It is customary to be on watch any time that he feels that things are not exactly as they should be going, subject to call at all times.

Q. And you had not been called had you, on this night, to take the watch?

A. No, I had slept all afternoon at Priest's Point and I considered that I had better stay up in the evening.

Q. You were called that evening?

A. Well, night time, evening.

Q. Now is it not a fact, Captain, you were on watch because you considered the weather to be dangerous and it

needed you there to attend to things?

A. No, it did not exactly need me there, but when you have some responsibility on your shoulders, it has a tendency to give you a little worry. Lots of people on these tow boats tell you that they do not worry, don't worry them with a tow. It is part of the business and naturally there is a tendency to worry a little.

Q. The conditions were such that you felt it necessary for you, the weather conditions were such that you felt it necessary to be on watch at hours when it was not customary for you to be on watch as captain?

A. It is customary for me to be on watch any time.

Q. Yes, I understand. But these are not your regular hours of watch, from one to six?

A. My regular hours are 24 hours a day.

Q. You do not mean to say you stand watch 24 hours a day?

A. No, I don't stand watch, but I catch a nap once in a while between times.

Q. That is the way you want to answer that is, that you are on watch all the time?

A. Yes, on watch all the time.

REDIRECT EXAMINATION.

MR. GORHAM:

Q. Did you retain your same relative position to the scow throughout this tow, from the Canyon Lumber Company to Richmond Beach?

A. Do you mean change of position of the boat or position of the scow?

Q. Did you retain the same position, the same end of the scow going first from the Canyon Mill clear to Blakely?

A. I kept the same end ahead all the time.

(Witness excused.)

PETITIONER'S TESTIMONY (Resumed).

HARRY GARNER, a witness called on behalf of Petitioner, being duly sworn, testified as follows:

MR. GORHAM:

Q. What is your business?

A. I have been working on tugs and steamers.

Q. How long?

A. Five or six years.

Q. What capacities?

A. Always in the deck department.

Q. Were you a member of the crew of the tug *Defender* December 11th and 12, 1918, on the voyage from the Canyon Lumber Company mill?

A. Yes, I was.

Q. You remember the circumstance of going into the mill and taking up that scow and starting off with her down the river?

A. Yes, I remember it.

Q. Now the scow was loaded when you got there?

A. Yes sir.

Q. It lies in a slip, does it not?

A. Yes, it lies in a notch cut into the wharf there.

Q. And did you come up the river or down the river after getting hold of the scow?

A. I don't just remember which river we came up; we must have come up the old river.

Q. As you approached this scow lying in this little offset in the wharf, did you approach it from down the river and come up the river toward it?

A. Yes sir.

Q. So that you approached it on your starboard side?

A. Yes, to be sure.

Q. On the tug's starboard side.

A. Yes.

Q. How did you make fast to it, do you remember?

A. Well, put a line aboard of her first and got a chance to look her over.

Q. Where was your bow relative to the point of the scow up river?

A. We were both in the same direction; our bows pointing in the same direction.

Q. Was the end of the steamer as far up as the up-river end of the scow—that is what I mean?

A. No.

Q. Could you see any one on the scow?

A. I did not take notice.

Q. You just came alongside; you did not notice any name.

A. No, not at that time; I was busy.

Q. What method did the captain indicate that he was going to take in taking the scow out, was he going to use a bridle?

A. Yes, we intended to use a bridle, but the bridle parted so that we had to put a spring line on.

Q. I show you a rough diagram of a tug and a scow

alongside. Now where would be your spring line. Just mark it there?

A. This would be what we call our stern line.

Q. Mark that line S.

A. (Does so). This would be our spring line, which would come over aft on the starboard side back to the stanchion and here the headline.

Q. Mark the spring line with an Sp.

A. (Witness does so.)

Q. And headline here.

A. Yes. (Witness marks headline.)

Q. Did you put these lines out and make her fast?

A. I helped in the operation of putting them out; there were two of us on deck.

Q. In this position, with these lines out, the scow was moved from its berth at the dock by the tug *Defender*?

A. Yes.

Q. And were the relative positions of the lines changed afterwards going down the river?

A. They were not changed until we got to Priest's Point.

Q. Did you put the stern line out?

A. Yes, I put the spring and stern line out, and as I remember the other deckhand put the headline out.

Q. Do you remember, as you put the stern line out, or at any time after that, whether or not you saw the name at that end of the scow?

A. Yes, I seen the name at that end of the scow, in tightening up the stern line in rounding the bend.

Q. The name *Claire* was that?

A. Yes. We stopped down there to shorten up our lines, and we shortened up on our headline and stern line, and I had to step over to the starboard to shorten this line up and I noticed there was a name on there. A circle there with a different word; I don't know, S. C. something on there.

Q. As you went down the river from the mill, how far did you get down before it was necessary to tighten up your lines to take in your slack?

A. That is hard to say. As well as I remember we must have gone between a quarter and a half mile, something like that.

Q. You were still inside of the mill?

A. Yes.

Q. And what was the occasion would you say of the slack being there?

A. Well, the natural effect on the line after it is once

tightened; of course it is natural for it to slack after it has a strain on.

Q. Now after taking in this slack, do you remember where you stood or what you were doing?

A. Yes, I was up on that load on the scow.

Q. What for?

A. For the purpose of watching for anything that should come up the river, such thing as another boat coming up the river, a person wants to see him, and to keep an eye on anything.

Q. To be a lookout.

A. Sure, that is the idea.

Q. And how soon after leaving the berth at the mill did you go up on top of the scow load?

A. Just as soon as we tightened the lines up, my part of the tightening up; the idea was that we would stop the boat and take in some slack on the stern line and then go ahead; and then slack on the headline. I went back and tightened on the stern line and then I climbed on top of the load immediately.

Q. Where was the scow then, relative to the right bank of the river?

A. I would not say that it was exactly mid channel, but we were not very far off from mid channel.

Q. And had the scow at any time previous thereto been near to the bank of the river?

A. No, I don't think so.

Q. After that did it get near the bank of the river?

A. No, it did not, until we tied at the dock—it was nearer when we were at the dock.

Q. You heard the captain's testimony here yesterday?

A. Yes sir.

Q. Did you hear him testify that the trees on the bank of the river brushed the scow?

A. You understand there is trees, the wash of the river washes the roots away, and they hang out over a good deal, further than the length of the scow.

Q. Was there any contact with the trees on the bank of the river?

A. Oh yes, naturally brushed the trees; on a boat running light we will do that; of course we did. I don't know that I could go down in a skiff without brushing something.

Q. Did the scow hit the bank in any way?

A. No, it did not.

Q. Did the scow at any time, after leaving the mill until it reached Priest's Point, come in contact with any obstruction, to your knowledge?

A. No, it did not.

Q. You say in shortening in the lines, the slack, you stopped the momentum of the steamer?

A. We would, yes.

Q. That would give her the appearance of drifting, to a man on the bank?

A. I don't know; it may. I never remember taking an observation.

Q. Now did the tug maintain the same relative position to that scow at all times thereafter until she got to Port Blakely? In other words, what we call the stern end of the scow, the same relative position to the tug as it was when you first took her out. Did you retain that?

A. Until we got to the point. We went ahead on the tow line after we got to the point.

Q. I will withdraw that question. Was the end of the scow, the opposite end on which the name is, always forward end of that scow in towing, either alongside or by line?

A. Yes, it was.

Q. All the way from the mill to Blakely?

A. Yes, I think we put our bridle on just the way she was lying at the dock.

Q. Where did you put the bridle on, at Priest's Point?

A. Yes.

Q. Did you see the captain sounding the well there on the scow at Priest's Point?

A. I seen the operation of sounding; of course I was not on watch.

Q. Did you see him sound the well there at the mill?

A. Yes, we sounded at the mill.

Q. What was the condition of the scow at Priest's Point at 11 o'clock at night on the 11th of December, as compared to her condition when you left the mill?

A. According to my knowledge it was the same.

Q. What was the state of the wind and sea at 11 o'clock, after leaving Priest's Point?

A. That is pretty choppy. I was not always watching the weather from my position on the boat.

Q. Was there a heavy sea on?

A. Nothing heavy.

Q. Was there a heavy sea running at any time between 11 o'clock at night and the next morning when you found the load was gone?

A. Not what you would call a heavy sea; a few small whitecaps out on the water, but nothing that a man would be afraid to go out in a rowboat in, like that.

CROSS EXAMINATION.

BY MR. RYAN:

Q. I am marking on this diagram the tug and the scow.
A. Yes.
Q. Now, when you left Priest's Point, you put the bridle on which end did you hook on to?
A. Well, we were in the same relative position with the scow at the time we put the bridle on.
Q. Which end would that be?
A. It should be the upper end.
Q. What hours were you on watch that night?
A. I was on watch when there is anything to do on deck.
Q. When was your attention first called to the fact that the scow had swamped?
A. Swamped?
Q. Yes.
A. It was on the morning watch; just what time it was I don't know.
Q. And was it daylight?
A. No, not yet.
Q. Who called it to your attention?
A. I think the captain did first.
Q. Was he on watch at the time?
A. He was up and around, yes; probably he was down in the galley at the time I first noticed him.
Q. What did you notice?
A. I did not notice anything at all; I was told about it.
Q. Who told you about it?
A. The captain.
Q. You saw him and he told you down in the galley?
A. I said, at the time, he was probably in the galley. I was steering at the time.
Q. You could not see from the galley?
A. According to what point it is.
Q. Could he see the scow at 500 feet?
A. He could if he stood in the doorway and looked back.
Q. And you think that was where he was?
A. I don't know where he saw it.
Q. You know he was not on watch?
A. He was not on watch.
Q. What time did he go to bed that night?
A. I do not remember him going to bed at all.
Q. Do you know that he did not go to bed?
A. Well, he was up about the pilot house; I did not see him go to his room.
Q. Were you in the pilot house all night?
A. No, I was not.

Q. What time were you in there?

A. I went up to spell him at the wheel; I was up there several hours talking to him.

Q. And what hours were you there?

A. I don't remember; it was the morning watch.

Q. Do you want to swear he did not go to bed at all that night?

A. I will swear he did not go to his bed room and go to bed. He might sleep in the coal bunkers, something like that.

Q. He did not generally sleep in the coal bunkers?

A. He did not generally sleep there.

Q. What would be the occasion of staying up all night?

A. The idea is very simple to steamboat men. Whenever you get a chance to sleep, they usually sleep. I think he probably slept in the afternoon as he says; I did not see him around.

Q. Did you see him go to his room in the afternoon?

A. Well, I never seen him anywheres; and I do not think he was ashore anywheres, and he must have been sleeping.

Q. You slept during the afternoon?

A. I slept some.

Q. Did you go to your bunk?

A. Yes sir.

Q. You do not know who first reported the scow sinking, do you?

A. Probably the captain.

Q. You don't know, but probably the captain.

A. He is the one that reported to me or told me, he mentioned it.

Q. What were the names of the other men who were aboard the boat?

A. I do not remember all of them; I remember the chief.

Q. Who was that?

A. I believe it was Hemrick; I don't know the others; they change so often.

Q. Did you have anything to do with keeping the log on this boat?

A. Well, with reference to taking courses and the time of passing different points, and sometimes weather, yes.

Q. You made entries, did you?

A. Yes.

Q. And where was that kept?

A. Made entries on paper and then captain entered them on the book.

Q. Have you any memorandums that you made?

A. No, I have not.

Q. Did you ever see the log book after this?
A. That is hard to tell; that is quite a while ago.
Q. It is not hard to tell, you either did or did not.
A. I may have seen it and may not.
Q. You have no recollection?
A. No recollection, not since.
Q. You did not testify in the case of the Canyon Lumber Company against the Dominion Mill Company, at Port Orchard?
A. No.
Q. Where do you live?
A. Everett.
Q. What is your business?
A. Working aboard steamers.
Q. By whom are you employed at the present time?
A. Not employed at the present time. Have not been for the last year; I have a ranch.
Q. Where were you last employed?
A. Last employed by Johnson.
Q. Where were you on the boat when the captain told you of the swamping of the scow?
A. Well, when he said the lights were out I was in the pilot house at that time.
Q. You and he were both in the pilot house?
A. Yes.
Q. What makes you think you first heard or saw of it down in the galley?
A. I will tell you now. He came from the galley and he came up and he says, the light is out, we will have to go back and see what is wrong; she seems to be towing all right, but we will go and see anyway. And I came to the conclusion he must have seen it down there, the reason he came up.
Q. Did you carry pumps on the boat?
A. Yes, a siphon pump that we had bolted to the deck that we used.
Q. Could you have used it if you had gone alongside of the scow, if you had noticed her filling with water? Could you use that deck pump to pump out the compartments?
A. The deck pump?
Q. Yes, whatever it is.
A. We could use the siphon; there was no use then.
Q. It was too late then. Do you know how long it would have taken to fill with water?
A. I have no idea.
Q. Do you not know how long she was filling with water?
A. Could not be very long.
Q. Why do you say it could not be very long?

A. Because a man looks back when he is towing every so often.

Q. How often did you look back on your tow?

A. Every twenty minutes, anyway.

Q. Twenty minutes before that had you looked back on the tow?

A. I had been looking every twenty minutes; I might have looked back fifteen minutes before that.

Q. Do you remember looking back 20 minutes before it was reported that the lights were out?

A. It might have been 10 or 15.

Q. And you saw the lights?

A. Yes.

Q. Did you go back at once when you discovered the lights were out?

A. Yes sir, we went back.

Q. And going back did you find any lumber drifting about where the scow was?

A. Several pieces, not to exceed a dozen.

Q. And you heard the testimony here that there was 900 pieces lost?

A. Yes sir.

Q. And how many pieces did you find around the scow, about?

A. I didn't count them, they were in the water there, but there could not be more than a dozen that I seen myself.

Q. And the rest of the load had gone, been left away behind?

A. Well, that went behind when carried away probably?

Q. Did you ever find the lights?

A. No.

Q. Did you go back to try to find them?

A. No.

RE-DIRECT EXAMINATION.

BY MR. GORHAM:

Q. You could not see very far at that time, could you? At five o'clock on a cloudy morning in the month of December on Puget Sound, it is not very light, is it?

A. I could not say as to how light or bright it was that morning, but you could not see very far.

Q. In looking back could you tell whether the scow was making water or not?

A. No, you could not see anything but the lights at that time.

MR. GORHAM: I offer this diagram used by the witness in evidence.

Paper marked Petitioner's Exhibit G, filed and returned herewith.

Q. What did you mean when you said the captain was not on watch, did you mean that he was not in the pilothouse?
A. He was up all right; I meant he was not in bed.
Q. You said he was not on watch, what did you mean by that?
A. Well, on some boats we observe this watch business, six and six.
Q. You mean stationed at the wheel?
A. Yes, that is what I mean.

BY MR. RYAN:

Q. Are you licensed to attend the wheel?
A. No.
Q. You were at the wheel at the time the lights were out, were you? How long had you been at the wheel?
A. Not more than three quarters of an hour, something like that.
Q. Whom did you relieve at the wheel?
A. Captain Jeffreys.

MR. GORHAM: The license does not call for a licensed man at the wheel on this steamer.

(Witness excused.)

Hearing adjourned, to be resumed by agreement.

SEATTLE, JUNE 22, 1921.

Present: MR. GORHAM, for Petitioner.
MR. DESMOND, for Claimant.

TESTIMONY FOR PETITIONER. (Resumed.)

T. H. HAYLEY, a witness called on behalf of the Petitioner, being first duly sworn, testified as follows:

BY MR. GORHAM:

Q. What is your business?
A. Supervisor for the Pacific Lumber Inspection Bureau.
Q. What are your functions as supervisor?

A. To hire my inspectors, who do the work under me; see that they are grading the lumber correctly, and issue certificates on their work.

Q. This is export lumber?

A. Export and domestic.

Q. For what mills on the Sound?

A. In the Northern District, which takes everything north of Seattle to the B. C. line.

Q. How many mills in your jurisdiction, approximately?

A. Twenty or more.

Q. How long have you been in this business?

A. With the Bureau about 16 years, I judge, offhand.

Q. In various capacities?

A. In this one capacity.

Q. What were you doing prior to that?

A. Inspecting.

Q. Lumber?

A. Lumber.

Q. Where?

A. Port Blakely, Tacoma Mill Company and various others.

Q. Do you remember being called to go down to Everett in the year 1919?

A. Yes sir, a little over two years ago.

Q. To inspect some timbers that were impounded there, said to have been lost off the scow *Claire*?

A. Not to inspect.

Q. I mean—

A. Pass my judgment on them as they appeared.

Q. That is what I mean.

A. Yes sir.

Q. At whose request did you go down there, or suggestion?

A. Mr. Hambridge of the Canyon Lumber Company.

Q. Do you remember the month you went down there? The loss of the *Claire* was in December, 1918, as shown by the testimony and the pleadings. With respect to that month of December, approximately when was it?

A. It was in the spring, about two years ago; probably January or February; I would not say to the date, I am not sure about that.

Q. Where were the timbers that you went down to examine?

A. The timbers were lying in the boom, between the Everett Improvement Company and the City Dock.

Q. On the Bay side of Everett?

A. On the Bay side of Everett.

Q. In whose charge were they, if you know?

A. No, I do not.

Q. Who pointed them out to you as the timbers that had been dumped off the scow *Claire*?

A. Why, Hambridge, we went down there together.

Q. What was the condition of these timbers, as you saw them at that time, as regards their being in a damaged condition or otherwise?

A. Why, the timbers were a little wore, and needed a little trimming, for instance take a man with a cross-cut saw and trim the pieces, square the timbers, where one had struck another and taken the corner off probably two or three or four feet, it would have to be trued if you wanted to ship it. They were in pretty good condition; I would consider they were fit to ship. Some of the corners were nosed a little, but nothing much.

Q. They would not require to be trimmed the full length, but just the corner?

A. One or two or four feet, whatever the chunk was taken off.

Q. You would consider that you could pass this and issue your usual certificate of inspection for export trade?

A. If in loading they turned out what they appeared to be, taking off what I say, I do not think I would have any hesitancy.

Q. What percentage of the sticks, as you saw them there impounded in the boom, would require that reconditioning?

A. That is pretty hard to say.

Q. I am asking simply your approximate, best judgment, if you have any memory of it.

A. Oh, I do not think there was one per cent.

Q. If there were 200 sticks, that would make only two sticks?

A. Yes.

Q. Would there be only two sticks that were damaged?

A. There were very few sticks in the boom damaged in that way.

Q. Was there any other damage to them that you saw?

A. One, if I remember right, was chafed quite considerably. I think it was a hexagon and had been pounded more than the square timbers, because its edge was lower than the other squares.

Q. Do you remember the dimensions of these timbers?

A. Six by twelve, I think; large square timbers.

Q. What would have been the approximate labor required to recondition the timbers damaged as you have explained, that is, taking them as you have explained, and the requirement to recondition as you have explained it, what would it amount to in labor, to do that work?

A. One man could do that nicely in one day; one day's pay for labor.

Q. For one man?

A. Yes.

CROSS EXAMINATION.

BY MR. DESMOND:

Q. Your best recollection, Mr. Hayley, was that this was some time in January or February, 1919?

A. Yes, along there, in the early part of the year; a couple of years ago.

Q. Could you give us an estimate of the quantity of timber that was there?

A. No. Because I was not asked to. I was just to go down and glance over it and look at one point; it was a round loose boom.

Q. Do you know from whence this timber was assembled.

A. No, nothing whatever.

Q. The sticks that you speak of at that time were lying in the boom in the water.

A. Yes.

Q. And assuming that this scow had lost her load on December 12th, 1918, the sticks would have been in the water up to the time you saw it?

A. Yes sir.

Q. How long a time did you spend inspecting the timbers?

A. Oh, probably three-quarters of an hour, not to exceed that.

Q. And you made no memorandum at the time, and you are testifying now from memory?

A. Purely from memory.

Q. And do I understand that these several sticks that you say were injured, were only damaged at their ends?

A. With the one exception that I remember, it looked as though it had been dragged across the others and frayed it considerably, but the rest of the timbers were in pretty good condition, just the ends, nosed a little.

Q. But as I understand it, the sticks that were damaged, in order that they might be put in good, merchantable condition and pass inspection, they would have to be individually retrimmed?

A. Yes sir.

Q. That would have to be done by hand, with a crosscut saw.

A. Sure.

Q. And that would necessitate their being hauled out of the water to do it.

A. No, not necessarily. You see, you can put a plank across several and push the one out you want to saw the end, and you have a chance to saw it that way.

Q. And you would have a number that would have to be so treated?

A. Yes.

Q. And you do not know how many sticks were in this boom?

A. No.

(Witness excused.)

CAPT. HENRY P. BARTMAN, a witness called on behalf of the Petitioner, being duly sworn, testified as follows:

MR. GORHAM:

Q. Your full name?

A. Henry P. Bartman.

Q. Your occupation?

A. Master mariner.

Q. How long have you been a master mariner?

A. Thirty-two years.

Q. In what trade?

A. Well, before I came to this country I was in big oil carriers and freighters on the Great Lakes.

Q. And you came to Puget Sound when?

A. Came here in 1903.

Q. What trade have you been in as master mariner?

A. Logging, towing booms—

Q. Towboat trade.

A. Yes sir.

Q. What is your license?

A. Unlimited master's license on the Great Lakes and Puget Sound.

Q. You are in the employ of the Pacific Towboat Company?

A. Yes sir.

Q. You were in their employ in December, 1918?

A. Yes sir.

Q. You are master now of what?

A. *Chickamauga.*

Q. Were you master of the *Chickamauga* at that time?

A. Yes.

Q. Is that a tug of the Pacific Tow Boat Company?

A. Yes.
Q. And was then?
A. Yes.
Q. I will ask you if you remember the accident that happened to the tow *Claire* when the *Defender* was towing her from Everett to Port Blakely in December, 1918?
A. Yes sir.
Q. You remember the circumstances?
A. I remember.
Q. When did you first hear of the accident?
A. Well, Mr. McNealy came and told me to go out to Ballard immediately, and that the *Defender* was lying out there with a scow that had lost the load off of.
Q. How soon was that after he had met with the accident?
A. I could not tell you how long it was. McNealy told me to go down to Ballard and you will meet with the *Defender* with a scow load of lumber, that they had spilled most of it coming in from Everett.
Q. Did you go?
A. Yes.
Q. With the tug *Chickamauga*?
A. Yes.
Q. What did you find the condition of the tug and scow to be when you arrived there?
A. When I got there the tug was tied up to the dolphin and the scow was hanging to her behind.
Q. Where is the dolphin?
A. It is situated just north about a thousand feet of the main channel that goes into Ballard.
Q. That is in Shilshoal Bay, is it?
A. Yes.
Q. Sheltered from the southeast and southwest winds?
A. Not from the southwest winds but from the southeast winds.
Q. What time of day did you arrive, approximately, was it in the morning or night or in the day?
A. I think it was in the forenoon, I would not exactly say.
Q. What was the condition of the scow as you saw her there?
A. Well, the scow was full of water, and she was lying with the end of the bow, we will call it the starboard side, was under water probably eighteen inches, and the timbers, as near as I can remember, were about five tier high on that side, on the back end of it, and about two tier on the front end. They would break joints as you go along, you know; and about half way across the scow, on the back end, and

on the front end about three-quarters of the way across she was under water; the back end on the port side was under water, probably three or four inches, something like that; but where I laid with the tug, near the forward corner of the scow, that was out of water from six to eight inches.

Q. Would that be the port stem or port stern?

A. Port stem, port bow.

Q. How did you approach her when you came up to her? Did you go on the scow personally?

A. Yes.

Q. From your tug?

A. Yes.

Q. How did your tug approach?

A. Circled around, laid right alongside, my pilot house right where her bow is; that is where the cleet is to make fast on the tug and also the piece on the scow is right there

Q. That is the towing bitt.

A. Yes, that is the towing bitt.

Q. That would be the port bow, what we might call the port bow of the scow?

A. Yes sir.

Q. Did you notice any name on the scow anywhere?

A. Yes, I seen the name.

Q. Where was the name?

A. Right under me on the port bow, right there, about ten feet as you came alongside, it was right in front of me.

Q. Was that on the end or the side of the scow?

A. That was on the side.

Q. Did you see the name on either end of the scow?

A. No sir.

Q. The stern of the scow was under water?

A. Yes, about six inches of one corner under and about 18 inches on the other corner.

Q. How long were you on the scow?

A. Oh, I should judge two hours or two and a half, something like that.

Q. What were you doing?

A. We took peaveys and took the timbers over and trimmed them over so as to get her on an even keel.

Q. Did you succeed in getting her on an even keel?

A. Yes, close as we could.

Q. Who was with you?

A. My son was with me; my crew was away on account we were expecting to have a vacation.

Q. From the *Defender,* I mean.

A. The mate was there from the *Defender* and the deck hand, and the captain of the *Defender.* There was five of us on the boat altogether.

Q. How were the lines made fast from the scow to the dolphin or tug?

A. The scow was lying on her bridle; this comes from each corner of the scow and comes to a center.

Q. Some 15 or 20 feet forward?

A. The bridle is about 65 or 70 feet in length.

Q. And that was made fast to the towing bitts on the scow.

A. Yes sir.

Q. On which end of the scow with reference to the name on the side that you say you want alongside of?

A. Passed right over it, or very near over the name.

Q. Was that on the forward end of the scow where the bridle was made fast?

A. Yes.

Q. And the hawser leading from the bridle was made fast to what?

A. To the tow bitts on the tug.

Q. At that time.

A. Yes, she was lying there hanging to the tug.

Q. Just in that way.

A. Yes, as near as I can remember.

Q. Have you any doubt in your mind?

A. No. I know that is the way she was hanging.

Q. I don't want any question about it. If you are guessing I want to know that. And if you know, we want to know that you know.

A. Yes, it was there hanging to the tug.

Q. Did you have occasion to put on one of the hatch covers?

A. I put one on that lay right in front of my pilothouse door. It was hanging on a chain three or four feet long. It was what we call counter-sunk hatch; you put it on and stepped on it; I did that so that we would not be backing into it when working about the deck.

Q. What was the condition of the other hatches?

A. Under water; I could not see them.

Q. Open?

A. I could not tell you; I could not see them.

Q. Why could you not see them, was there a load over them?

A. On the back end there was and on the other end I did not pay attention to it.

Q. Did you see any damage to the scow on the stem, on either the port or starboard bow, or on the stem of the bow, the forward end?

A. There was nothing that I could see on that particular corner, that is all I could see.

Q. Any seams open there that you observed?
A. I did not look for it.
Q. You did not see any, however?
A. No, I did not see any.
Q. Now after getting that scow on an even keel, what did you do?
A. I put my tow line on with the *Defender* and we started to take her over to Blakely.
Q. When was this, that same day you were there?
A. Yes sir, the same day, that afternoon, and I went as far as West Point with her, and the wind commenced to blow so bad I was afraid of washing the balance of the timber off and we turned around and put her back at the dolphin.
Q. Was it your judgment or the judgment of the *Defender*?
A. We were side by side and talked the thing over, so we went back and tied her up.
Q. You tied her up at the same dolphin?
A. Yes sir.
Q. How long was she tied up there then on your return?
A. I could not tell.
Q. How long were you there?
A. I went into Ballard and telephoned to our office in Seattle and was ordered here.
Q. That is all you know about it?
A. Yes sir.

CROSS EXAMINATION.

MR. DESMOND:

Q. As I understand it, Captain, this was the forenoon of the 13th of December, 1918.

MR. GORHAM: That was wrong. The log shows it was the morning of the 12th.

Q. It was either the 12th or 13th of December, about that time.
A. Yes.
Q. You had not seen this scow before?
A. Not on that particular trip.
Q. Did it indicate that part of its load had been dumped?
A. Oh yes.
Q. As I understand it the stern was under water.
A. Yes.
Q. And the port bow was the only corner that was out of water?

A. Yes sir.
Q. And the hatch on the port bow was open.
A. Yes, that is the one I put on.
Q. When you came up there the *Defender* was lying alongside the scow?
A. No, the scow was hanging on her stern.
Q. You do not know who had been aboard the scow prior to the time you were there?
A. No sir.
Q. You do not know of your own knowledge how that hatch was opened, or what opened it?
A. No sir.
Q. Now you say you did not notice any damage forward on the scow?
A. No sir.
Q. You could not see the stern of the scow.
A. No sir.

(Witness excused.)

Hearing adjourned until June 23, 1921.

JUNE 24, 1921.

Present: MR. GORHAM, for Petitioner.
MR. DESMOND, for Claimant.

MR. GORHAM: It is admitted that the timbers inspected by Hayley on the Bay side at Everett, as testified to by him, were the timbers lost off the scow *Claire,* concerning which this action is brought.

It is admitted that it was high water at Tulalip at 11:31 p. m. on December 11th, and that the tide ebbed thereafter until 4:57 a. m. on the 12th, in the waters of Puget Sound.

It is admitted that in the waters of Puget Sound that the wind and tide running in the same direction, there is no sea kicked up.

MR. DESMOND: Yes.

A. L. McNEALY, a witness called on behalf of Petitioner, being duly sworn, testified as follows:

MR. GORHAM:

Q. You are manager of the Pacific Tow Boat Company?

A. Yes.
Q. Were you manager in December, 1918?
A. Yes sir.
Q. Your company at that time was the owner of the American tug *Defender*?
A. Yes sir.
Q. The tug was in commission and engaged in towing during that month?
A. It was.
Q. And towed the scow *Claire* from the Canyon Lumber Company mill on the river side of Everett, December 11th, that year?
A. Yes sir.
Q. What, if anything, had the Pacific Tow Boat Company done to maintain that vessel, and in what condition was she maintained at that time?
A. The vessel was in good seaworthy condition, and she, like the rest of our boats, we always keep very well equipped with everything necessary, for the class of business they are in.
Q. All appliances for the business in which they are engaged.
A. Yes sir.
Q. And in compliance with all the requirements of the law.
A. Absolutely.
Q. Was she manned by licensed officers?
A. Licensed men and competent men.
Q. Men of experience.
A. Yes sir.
Q. You knew of this accident after it happened?
A. Yes.
Q. Looking back at it, do you know of anything that the Pacific Tow Boat Company could have done prior to the accident, which would have prevented the accident?

MR. DESMOND: I object as incompetent and immaterial, and calling for a conclusion of both fact and law.

A. I think the company and the master both did everything possible to avoid an accident; took all the precautions that a man could take.

Q. Did the company know, further than the telephone communication which Captain Jeffries testified to at Priest's Point, did the company know when or under what circumstances the tug conducted the towage service with the scow *Claire* in tow on December 11th and 12th?

A. No sir.

Q. You did not see the tug that day.
A. No sir.
Q. You have general charge of the business?
A. Yes.
Q. You are the executive officer of the company?
A. Yes sir.
Q. There is a president of the corporation?
A. Yes, there is a president of the corporation, but I have active charge.
Q. And had at that time.
A. Yes sir.
Q. The president does not assume any of these functions?
A. No.
Q. Subsequent to this loss of lumber off the scow, it appears that the tug lay in Lake Union a year and was thereafter dismantled. Do you know how long after this accident she went out of commission, approximately, just by months or years?
A. I do not remember just how long after that we did lay her up, but we laid her up on account of business.
Q. And afterwards decided to remodel her?
A. And afterwards decided to remodel her and do considerable work on her.
Q. What became of her crew, if you know, other than Captain Jeffries?
A. Well, the crews on these boats, they are moving light, and are men who come and go, that is, the majority of them.
Q. That is what we call 'turn-over.''
A. Yes. Of course, Captain Jeffries has been with me for a number of years before that and is still with me.
Q. The engineers?
A. I was not able to locate the engineers, firemen or cook. We located the deckhand, I think.
Q. Now, Mr. McNealy, you went to Everett before this hearing commenced, and had some photographs taken of this vessel.
A. Yes sir.
Q. Is that you standing on the scow in exhibit ''D''?
A. No, that is Mr. Moe.
Q. Is this you standing on the scow in exhibit ''A''?
A. Yes sir.
Q. Did you hear Mr. Neimeyer's testimony in this case with reference to there being a split gunnel on the inside bulkhead of the scow, upon the return of the scow to Everett from Port Blakely, during the voyage in controversy?
A. Yes, I heard that testimony.

Q. Did you go down in the hold of the vessel with Mr. Neimeyer?

A. I asked Neimeyer to show me that crack in the gunnel.

Q. At this time when you were at Everett?

A. Yes, at the time when we were there. And Neimeyer says come down here and I will show it to you. So we both went down in the hold of the scow and he looked around it but could not find any crack. And I says, where is the crack? Well, he says, it is here somewhere. And I says show me. But there was no crack there.

Q. Did he show it to you?

A. No split there. No, he could not show it.

Q. Referring to exhibit D, one of the witnesses for the Claimant testified that the gunnel which was cracked was just below the red ink on the photograph marked G. T.?

A. Between these two hatches.

Q. One and two?

A. Yes. Hatch one in red ink, he said the gunnel between 1 and 2, was the one split and there was no split there.

Q. That is the gunnel you did go down to and that is the place you made the investigation.

A. Yes sir. I asked him if there was any other split gunnel, and I said I would like to see it. He said, I don't know where it is. That is about the way he answered.

Q. Was there any broken gunnel? One witness testified it was not split, but broken. Was there any gunnel there broken or split?

A. No.

Q. How close an examination did you make?

A. I looked all around in that gunnel where he said it was.

Q. Would you have seen it if it had been there?

A. Yes sir; I went over it thoroughly.

Q. What was the light in the scow there to enable you to make an examination?

A. There was plenty of light in that end of the scow. I took matches out of my pocket and looked particularly.

Q. Other testimony is that this gunnel was broken or split thirty or forty feet.

A. No, it was not anything of the kind.

Q. Now, Mr. McNealy, if there is anything further concerning which I have not interrogated you, you being the manager of the company, being upon the case, I wish you would testify to it, if you know anything further that would throw any light on this question at issue?

A. There is nothing I can think of just now.

Q. With reference to the salving of the lumber. Mr. Mitchell of the Dominion Mill Company has testified in this case. Did he ask you to make an effort to salve that lumber?

A. Immediately after this accident happened, which is always my custom to do, I called up Mitchell and told him of the accident. He was very anxious to get the lumber in there, I knew. Well, he said, where did the lumber go. I says I don't know, Mitchell, where it went. I says I should think it would go down off Double Bluff there. He says let me know when you find it.

Q. What you call Double Bluff is Skagit Head?

A. Yes sir. We found it over there on Whidby Island, by sending a boat out, and I reported to him where most of it was. I could not find any of it floating. Well, he says, will you look after the picking of it up? I says I will do that for you. He says, you do that and get it together. So we picked it up. It took considerable time to do it, the weather was bad during that time, and we took it into Everett in different lots, and I kept calling Mitchell, and telling him what we had brought it, and asked him if he wanted us to take it over to Blakely. And finally we got it all in, that is all we brought in there. And he said to me one day, he says, I think you better tow it down to Port Blakely. I said, Mitchell, I don't think it is safe to tow in this kind of weather with timber in boomsticks; I says if you get into a storm at all you will lose it again. He says, all right Mack, I will look at it and see if we cannot arrange to pick it up with a derrick or something. And I says I have spent a lot of money picking up the timbers, and he says I can understand it and he says I will see you are taken care of, at least for the better part of it.

Q. Better part of what?

A. Better part of the cost.

Q. Did he go down there to your knowledge, or with you, to Everett to examine the timber?

A. He did not go down with me, but he went down there.

Q. Did you go down?

A. Oh, I was in Everett at various times.

Q. Did you have occasion to make an inspection or examine the timbers in the boom?

A. No, I did not go to the boom to examine it. We have an office there and have men there and a man looking after it; and he kept complaining about the timbers going out, and he had bother to keep them in. And I kept after Mitchell trying to get him to do something.

Q. About how long were they being picked up and brought to the boom, over what period of time did it extend?

A. Probably thirty or forty days.

Q. Do you know when Hayley went down with a gentleman from the Canyon Mill to look over that?

A. I don't know. I did not know of that until a considerable time afterwards.

Q. That is only hearsay.

A. Yes. I did not know at the time Hayley went down.

Q. Do you know that he went down subsequent to all the timbers being picked up, or before they were all picked up?

A. It was sometime after we stopped picking the timbers up, Moe told me that Hayley and Hambridge went down there.

MR. DESMOND: I move to strike what the witness was told.

MR. GORHAM: It may be stricken, of course.

Q. What finally became of the lumber?

A. The timber has gradually worked out of the boomsticks. Our boom is right on the river, and considerable current there, and we are moving logs in and out of there all the time, and they gradually worked out of the sticks.

Q. And went to sea?

A. And went to sea.

Q. Mitchell never came to get them?

A. No.

Q. Did your company know of any unseaworthy condition in the scow *Claire* on December 11th, 1918?

A. No sir.

Q. Had your company been advised as to any unseaworthy condition of the scow at that time when this tug was sent for that tow?

A. No.

Q. And when you send your tugs out on towage service you rely upon the judgment of the master?

A. Entirely with reference to weather or time to go or not to go.

Q. And care is taken by your company to see that the men are competent men in charge of your vessels?

A. Yes sir.

CROSS EXAMINATION.

MR. DESMOND:

Q. You were not there at the time the tug took the scow out of the Snohomish river?

A. No sir.

Q. You were not aboard the tug that day?
A. No sir.
Q. Nor were you aboard the scow *Claire.*
A. No sir.
Q. Did you or any of your employees or servants, make any examination of the scow *Claire* before taking the tow out?
A. The captain has testified to that.
Q. When did you see the tug *Claire* after the accident?
A. Not until this pictures were taken.
Q. When was that?
A. That was this year.
Q. Had the scow been in service in the meantime, do you know?
A. I don't know as to that.
Q. Do you know how much timber was impounded in your boom at Everett?
A. Without the figures here, I could not; I have forgotten now.
Q. That is in the record.
A. I think it is in the record.
Q. When did you dismantle the tug?
A. That was in the latter part of last year.

(Witness excused.)

MR. GORHAM: We rest.

United States of America,
Western District of Washington, } ss.
Northern Division.

I, A. C. BOWMAN, a Commissioner of the United States District Court for the Western District of Washington, residing at Seattle, Washington, do hereby certify that

The foregoing transcript from page 1 to page 200, both inclusive, contains all of the testimony offered by the parties to said cause. The several witnesses, before examination, were duly sworn to testify the whole truth. I reduced their testimony to writing in shorthand and thereafter caused the same to be typewritten; and I certify the foregoing to be the testimony given by the said witnesses at the times therein indicated.

The exhibits offered, as shown by the testimony and index, have been properly identified and are returned herewith.

Proctors for the parties waived the reading and signing of the testimony given by the several witnesses.

I further certify that I am not of counsel nor in any way interested in the result of said cause.

Witness my hand and official seal this 27th day of June, 1921.

A. C. Bowman,
U. S. Commissioner.

Commissioner's Taxable Costs:

Petitioner's costs, $31.30.

Claimant's costs, $63.50.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, June 29, 1921.

F. M. Harshberger,
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In the Matter of the Petition of the Pacific Tow Boat Company, a corporation, owner of the American Tug Defender, for Limitation of Liability.

In Admiralty—No. 5207.

DECISION.

Filed July 19, 1921.

William H. Gorham, Proctor for Petitioner.

Ryan & Desmond, Proctors for Claimants, Dominion Mill Co.

NETERER, *District Judge.*

The issue here is a question of fact. It is conceded that liability may be limited if negligence is shown, and in that event the decree shall not exceed the sum of $2,700.00, the appraised value of the tug. The facts to be found are the seaworthy condition of the scow, the negligence of the claimant, if any, and the amount of damage, if any, to be decreed. From the testimony it must be concluded that the scow at the time it was taken by the petitioner was seaworthy. It was very recently placed in "good condition." It was inspected by Wilson, the repairman for claimant. A few days before the casualty it was towed from Everett to Anacortes,

and found in good condition. It was examined by the master of petitioner at the time it was taken and found that it had not water enough to siphon. It also appears that it was properly loaded. This was the status when the petitioner took the scow. It was taken into the open waters of the Sound and approximately 250,000 feet of lumber was lost. Something less than 50,000 feet was delivered. The petitioner asserts that it was free from negligence and that the fault was with the scow, because of age, decay &c., she was unseaworthy. The only testimony of negligence is that the scow went onto the bank in the river, and also some testimony that the condition of the weather was such by reason of strong wind that a careful master would not venture out. There is also testimony as to the condition of the scow after she reached the mill. A long crack near her top seam in one corner; and one of the timbers in the gunnel was split. There is no continuity of evidence as to the scow from the time of delivery until the survey about ten days after, during which time she was on the beach. It is impossible to harmonize all of the evidence. The court from the evidence must find that the scow collided with the bank of the river. Two disinterested witnesses so swear. The extent of the damage, if any, no one who testified saw. The master swears he examined the scow at Priest Point after the time of collision charged before entering the open waters of the Sound, and found her to be all right. Entering the open waters of the Sound the lumber was lost. It must be concluded in view of the testimony that either the running on to the bank or the turbulent condition of the water occasioned the loss, and in either event the petitioner was at fault and should respond, and under Sections 4283 and 4284, Rev. Stat. the liability may be limited to the value of the tug. It is earnestly contended by the petitioner that even though the tug was negligent, that practically all of the lumber was salved and placed in a boom at Everett and testimony is produced that one man with a crosscut saw could in one day trim all of the damaged timber, so there would be no loss. The testimony, I think, shows that the damage by reason of the rounding of the edges of the square timber could not be compensated in the manner indicated. Again it was the duty of the petitioner to deliver the cargo at Blakely Island, and could not relieve itself from liability by placing the timbers in a boom at Everett and notifying the claimant of such fact. The damage to the claimant is more than twice as much as the appraised value of the tug, and it appears from the testimony that the cost to recondition the lumber, and difference in value, it being a special order, and place it either at the point of shipment or destination would be as much at least

as the value of the tug, and for this expense the claimant could recover in any event.

A decree may accordingly be presented.

JEREMIAH NETERER,
Judge.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Feb. 19, 1921.

F. M. HARSHBERGER,
Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In the Matter of the Petition of the Pacific Tow Boat Company, a corporation, owner of the American Tug DEFENDER, for a Limitation of Liability.

In Admiralty—No. 5207.

FINAL DECREE.

The Petitioner, the Pacific Towboat Company, a Washington corporation, owner of the American Tug *"Defender,"* having, on or about the 2nd day of April, 1920, filed in this court its petition, alleging, among other things, that the Claimant, the Dominion Mill Company, was then prosecuting an action in the Superior Court of the State of Washington, for King County, against the petitioner, claiming damages for loss at sea of 248,206 feet of lumber, which was of the value of Seven Thousand Four Hundred Forty-six and 18/100 ($7,446.18) Dollars.

Said Petition further alleged that the value of the tug, at the time said towage service was being rendered, including the towage charge of Seventy-five ($75.00) Dollars, did not equal the amount of said damage claimed, and prayed that the liability of the Petitioner be limited to the value of said tug and the earned towage charges.

AND, THEREAFTER, this court caused an appraisal of said tug to be made, as of date of December 12th, 1918, which appraisal is for the amount of Two Thousand Eight Hundred Seventy-five ($2,875.00) Dollars, together with interest thereon from date of December 12th, 1918; and the Petitioner entered into a stipulation and bond with the United States Fidelity & Deposit Company, of Maryland, as

surety, to pay all costs in said action, not exceeding the amount of Two Hundred Fifty ($250.00) Dollars; and said Petitioner and Surety above named further stipulated to pay the further amount of Two Thousand Eight Hundred Seventy-five ($2,875.00) Dollars, with interest from December 12th, 1918, into the registry of this court for the benefit of any claimant.

AND, THEREAFTER, the Dominion Mill Company, a corporation, organized under the laws of the State of California, and authorized to do business in the State of Washton, duly and regularly filed its claim in said cause against the tug above named, claiming damages for the loss of 248,-206 feet of lumber, of the reasonable value of Seven Thousand Four Hundred Forty-six and 18/100 ($7,446.18) Dollars, on account of the careless and negligent acts of the said tug "*Defender*" in towing the said scow of lumber for the claimant.

AND, THEREAFTER, an Order of Reference was by this court made wherein the matter was referred to United States Commissioner, A. C. Bowman, for the taking of testimony, the taking of which having begun on the 16th day of March, 1921, and completed on the 24th day of June, 1921; said testimony was by the Commissioner transcribed and certified, and this court having examined the said testimony, and arguments by the proctors for the petitioner and claimant, having been heard, and being now in all ways fully advised in the premises:

IT IS BY THE COURT ORDERED, ADJUDGED and DECREED:

I.

That the claim of the Dominion Mill Company be allowed against the tug "*Defender,*" in the full amount of her appraised value, being the sum of Two Thousand Eight Hundred Seventy-five ($2,875.00) Dollars, together with interest thereon at the rate of Six (6%) per cent per annum from date of December 12, 1918;

II.

That said Petitioner, the Pacific Towboat Company, and its surety, the Fidelity & Deposit Company, a corporation, of Maryland, be and they hereby are directed to forthwith pay into the registry of this court, for the benefit of the claimant, the full amount provided within said stipulation, being the amount of Two Thousand Eight Hundred Seventy-five ($2,875.00) Dollars, together with interest thereon at

the rate of Six (6%) per cent per annum from date of December 12th, 1918.

III.

That the claimant, the Dominion Mill Company, have judgment against the Petitioner, the Pacific Towboat Company, and its surety, the Fidelity & Deposit Company of Maryland, for the amount of its costs herein incurred.

IV.

That in the event of default on the part of the said Petitioner, or its surety, forthwith to pay the above sums into the registry of this court, execution may issue against their goods, chattels and lands for the said sums.

V.

That upon the payment of the above amounts, by the said Petitioner and its surety, there shall be no further liability on behalf of said Petitioner, or its surety, to the Claimant for any sums whatsoever on account of damage sustained, as set forth in its claim.

DONE IN OPEN COURT this 2d day of August, A. D. 1921.

JEREMIAH NETERER,
Judge.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 2, 1921.

F. M. HARSHBERGER,
Clerk

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the Pacific Tow Boat Company, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

ORDER FIXING AMOUNT OF SUPERSEDEAS AND AMOUNT OF BOND FOR COSTS AND INTEREST ON APPEAL.

Upon motion of the petitioner in the above entitled Matter for an order herein fixing the amount of supersedeas and amount of bond for costs and interest on appeal.

It is ordered that the amount of the bond to be given by

said petitioner herein upon appeal be fixed in the sum of $500.00 as a supersedeas to cover the costs of the suit and just damages for delay and the further sum of $250.00 to cover costs and interest on appeal.

Dated, Seattle, August 2, 1921.

JEREMIAH NETERER,
Judge.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, Aug. 2, 1921.

F. M. HARSHBERGER,
Clerk

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the Pacific Tow Boat Company, a corporation, owner of the American Tug DEFENDER, for a Limitation of Liability.

NOTICE OF APPEAL.

To the Dominion Mill Company, a corporation, claimant in the above entitled matter, and to Messrs. Ryan & Desmond, its Proctors:

You and each of you will please take notice that the Pacific Tow Boat Company, a corporation, the above named petitioner, hereby appeals from the final decree of the above entitled court in the above entitled matter and from the whole thereof, which decree was made, entered and filed in said matter on the 2nd day of August, 1921, to the United States Circuit Court of Appeals for the Ninth Circuit.

PACIFIC TOW BOAT COMPANY,
Petitioner.
WILLIAM H. GORHAM,
Proctor for Petitioner.

Due service of the within Notice of Appeal after the filing of the same in the office of the Clerk of the above entitled Court in the above entitled Matter, admitted this 2nd day of August, 1921.

RYAN & DESMOND,
Proctors for Dominion Mill Company, Claimant in the above entitled Matter.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, August 2, 1921.

F. M. HARSHBERGER,
Clerk.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the Pacific Tow Boat Company, a corporation, owner of the American Tug DEFENDER, for a Limitation of Liability.

BOND ON APPEAL.

Know All Men by These Presents: That we, the Pacific Tow Boat Company, a corporation, the above named petitioner, as principal, and Fidelity and Deposit Company of Maryland, as surety, are held and firmly bound unto the Dominion Mill Company, a corporation, claimant in the above entitled Matter, in the full sum of seven hundred and fifty ($750.00) dollars to be paid to said Dominion Mill Company, its successors and assigns, for which payment well and truly to be made we bind ourselves, our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 2nd day of August, 1921.

Whereas, lately at a District Court for the Western District of Washington, Northern Division, in a proceeding pending in said court on the petition of said Pacific Tow Boat Company, owner of the American Tug *Defender,* for a limitation of liability, wherein said Dominion Company was and is claimant, a decree was rendered against said petitioner and in favor of said claimant; and said petitioner having filed in the office of the Clerk of said District Court and served on proctors for said claimant, in said proceedings, a notice, signed by said petitioner, that said petitioner appeals to the United States Circuit Court of Appeals for the Ninth Circuit from said decree and the whole thereof;

Now therefore, the condition of this obligation is such, that if the above bounden principal shall prosecute its appeal to effect and pay the costs if said appeal is not sustained and if said principal will abide by and perform whatever decree may be rendered by the United States Circuit Court of Appeals for the Ninth Circuit, or on the mandate of said

United States Circuit Court of Appeals for the Ninth Circuit by said District Court, then this obligation to be void, otherwise to be and remain in full force and effect.

PACIFIC TOW BOAT COMPANY.
By A. F. MCNEALY, *Its Manager.*

FIDELITY AND DEPOSIT CO. OF MARYLAND.
J. A. CATHCART, *Attorney in Fact.*

Approved:
RYAN & DESMOND,
Attorneys for Claimant.

Bond approved this 2nd day of August, 1921.

JEREMIAH NETERER, *Judge.*

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, August 2, 1921.

F. M. HARSHBERGER,
Clerk.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the Pacific Tow Boat Company, a corporation, owner of the American Tug DEFENDER, for a Limitation of Liability.

ASSIGNMENT OF ERRORS.

Comes now the Pacific Tow Boat Company, the above named petitioner, and assigns as error in the findings, conclusions and decree of the above entitled court in the above entitled matter:

1. That the court erred in finding that it must be concluded that the scow at the time it was taken in tow by the petitioner was seaworthy.

2. The court erred in finding that the scow was properly loaded.

3. The court erred in finding that the scow collided with the bank of the river.

4. The court erred in finding that either the scow running into the bank or the turbulent condition of the waters occasioned the loss of the lumber.

5. The court erred in concluding that in either of said events the petitioner was at fault.

6. The court erred in finding that the damage to the lumber by reason of the rounding of the edges of the square timbers could not be compensated by one man with a crosscut saw trimming the same in one day.

7. The court erred in concluding that it was the duty of the petitioner to deliver the cargo at Blakely Island and could not relieve itself from liability by placing the timbers in a boom at Everett and notifying the claimant of such fact.

8. The court erred in finding that the damage to claimant was more than twice as much as the appraised value of the tug.

9. The court erred in finding that the cost to recondition the lumber would be as much at least as the value of the tug and in concluding that this expense the claimant could recover in any event.

10. The court erred in entering a decree against petitioner and in favor of claimant in the sum of $2,875.00 together with interest and costs, or in any sum whatever.

11. The court erred in not entering a decree adjudging that the petitioner and said tug *Defender* are not and neither of them is liable to any extent or at all for the loss, damage or injury alleged to have been sustained by claimant as in its answer to the petition herein set forth.

WILLIAM H. GORHAM,
Proctor for Petitioner.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, August 2, 1921.

F. M. HARSHBERGER,
Clerk.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the Pacific Towboat Company, a corporation, owner of the American Tug DEFENDER, for a Limitation of Liability.

ORDER SENDING UP THE ORIGINAL EXHIBITS

Upon motion of the petitioner in the above entitled matter, good cause being shown,

It is now by the undersigned presiding Judge in said court ordered that all the original exhibits introduced in evidence and filed herein be sent up by the Clerk of this court as a part of the record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit, instead of copies thereof.

Dated, Seattle, September 8, 1921.

JEREMIAH NETERER,
Judge of the Above Entitled Court.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, September 8, 1921.

F. M. HARSHBERGER, *Clerk.*
S. E. LEITCH, *Deputy.*

IN THE UNITED STATES CIRCCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 5207.

In the Matter of the Petition of the Pacific Towboat Company, a corporation, owner of the American Tug DEFENDER, for a Limitation of Liability.

PACIFIC TOW BOAT COMPANY, a corporation, *Petitioner-Appellant,* vs. DOMINION MILL COMPANY, *Claimant-Appellee.*

STIPULATION.

It is hereby stipulated and agreed by and between the parties hereto, through their respective proctors undersigned, that the claimant and appellee may file its appearance in the above entitled court and cause at any time subsequent to the filing of appellant's record therein and prior to the date set for hearing of the appeal herein.

Dated at Seattle, Washington, this 27th day of August, 1921.

WILLIAM H. GORHAM,
Proctor for Petitioner-Appellant.

RYAN & DESMOND,
Proctors for Claimant-Appellee.

Endorsed: Filed in the United States District Court,

Western District of Washington, Northern Division, September 8, 1921.

F. M. Harshberger, *Clerk.*
S. E. Leitch, *Deputy.*

UNITED STATES CIRCUIT COURT OF APPEALS FOR NINTH CIRCUIT.

No. 5207.

In the Matter of the Petition of the Pacific Tow Boat Company, a corporation, owner of the American Tug Defender, for a Limitation of Liability.

Pacific Tow Boat Company, a corporation, *Petitioner-Appellant,* vs. Dominion Mill Company, a corporation, *Claimant-Appellee.*

STIPULATION.

It is hereby stipulated by the parties hereto:

That an order may be entered in the above entitled cause by any Judge of the above entitled court or by the Judge who signed the Citation on Appeal in said cause, enlarging and extending the time for filing the record and docketing said cause on appeal in the above entitled court by petitioner-appellant, to December 1st, 1921.

Dated August 27, 1921.

William H. Gorham,
Proctor for Petitioner-Appellant.

Ryan & Desmond,
Proctors for Claimant-Appellee.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, September 8, 1921.

F. M. Harshberger, *Clerk.*
S. E. Leitch, *Deputy.*

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the Pacific Tow Boat Company, a corporation, owner of the American Tug Defender, for a Limitation of Liability.

PRAECIPE FOR APOSTLES.

To the Clerk of the Above Entitled Court:

Herewith I hand you 25 printed copies of the Apostles on Appeal to the United States Circuit Court of Appeals for the Ninth Circuit, consisting of the following:

1. A caption exhibiting style of court and cause;
2. Index;
3. Statement complying with Rule 4, Section 1, of the Rules in Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit;
4. Petition for limitation of liability;
5. Order appointing appraisers;
6. Appraisers' report;
7. Order confirming appraisers' report;
8. Stipulation to pay appraised value;
9. Order for monition and restraining order;
10. Monition and return of U. S. Marshal thereon;
11. Answer to petition for limitation of liability;
12. Report of U. S. Commissioner with claim of Dominion Mill Company.
13. Stipulation limiting amount of recovery by claimant;
14. Order of reference;
15. All the testimony contained in report of referee;
16. Memorandum decision of court;
17. Final decree;
18. Order fixing amount of supersedeas;
19. Notice of appeal;
20. Bond on appeal;
21. Assignment of errors;
22. Stipulation as to appearance of appellee on appeal;
23. Stipulation enlarging time to file record and docket cause on appeal;
24. Order sending up original exhibits;
25. This praecipe;

one of which copies you will please certify under your hand and the seal of the court and the remainder of which bear such certificate in printed form, and all of which you will please forward, together with the original Citation and the original exhibits under a separate certificate by you, to the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, for filing and docketing of said cause on appeal therein.

WILLIAM H. GORHAM,
Proctor for Petitioner-Appellant.

Service of within praecipe on this 20th day of September, 1921, admitted.

RYAN & DESMOND,
Proctors for Claimant-Appellee.

Endorsed: Filed in the United States District Court, Western District of Washington, Northern Division, October 11, 1921.

F. M. HARSHBERGER,

S. E. LEITCH, *Deputy.*
Clerk.

IN THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

In Admiralty—No. 5207.

In the Matter of the Petition of the Pacific Tow Boat Company, a corporation, owner of the American Tug DEFENDER, for a Limitation of Liability.

United States of America,
Western District of Washington, ss.

I, Frank M. Harshberger, Clerk of the United States District Court for the Western District of Washington, Northern Division, do hereby certify the foregoing printed pages, numbered 1 to 166, inclusive, to be a true, full, correct and complete copy of the record and proceedings in the above entitled cause as is called for by the praecipe of the petitioner-appellant a part thereof, as the same remains of record and on file in the office of the Clerk of said court, and that said printed pages, together with the original exhibits, separately certified, constitute the record on appeal from the final decree of the United States District Court for the Western District of Washington, Northern Division, to the United

States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California.

I further certify the following to be a true, full and correct statement of the expenses, costs, fees, and charges incurred and paid into my office by and on behalf of petitioner-appellant for preparing and making the record certificate or return, and apostles on appeal to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee for preparing and making record and apostles of appeal:

713 folios at 15 cents per f.	$106.95
Certificate of Clerk to transcript of record	.60
Seal to said certificate	.20
Certificate to original exhibits	.30
Seal to said certificate	.20
Statement of cost of printing said transcript, collected and paid	274.40

I hereby further certify that the above cost for preparing, making, certifying and printing said record, amounting to $382.65, has been paid me by William H. Gorham, proctor for petitioner-appellant.

I further certify that I hereto attach and herewith transmit the original Citation issued on appeal in said cause.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said United States District Court for the Western District of Washington, at Seattle, Washington, this 1st day of November, 1921.

F. M. Harshberger,
Clerk.

No. 3798.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition of the PACIFIC TOW BOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

PACIFIC TOW BOAT COMPANY,
a corporation,

Petitioner-Appellant,

vs.

DOMINION MILL COMPANY,
a corporation,

Claimant-Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Brief for Petitioner-Appellant

WILLIAM H. GORHAM,
Proctor for Petitioner-Appellant.

652 Colman Building,
Seattle, Washington.

THE IVY PRESS, SEATTLE

No. 3798.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition of the PACIFIC TOW BOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

PACIFIC TOW BOAT COMPANY,
a corporation,

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vs.

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a corporation,

Claimant-Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Brief for Petitioner-Appellant

WILLIAM H. GORHAM,
Proctor for Petitioner-Appellant.

652 Colman Building,
Seattle, Washington.

SUBJECT INDEX

LIST OF CASES

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition of the PACIFIC TOW BOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of liability.

PACIFIC TOW BOAT COMPANY,
a corporation,

Petitioner-Appellant,

vs.

DOMINION MILL COMPANY,
a corporation,

Claimant-Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Brief for Petitioner-Appellant

STATEMENT OF CASE.

This is an appeal taken by the Pacific Tow Boat Company, petitioner-appellant, from the decree of the United States District Court for the Western District of Washington, Northern Division, adjudg-

ing that the claim of the Dominion Mill Company, claimant and appellee, in the sum of $2,875.00 together with interest thereon at six per cent per annum from December 12, 1918, be allowed; and giving judgment in favor of said Dominion Mill Company and against said Pacific Tow Boat Company and the Fidelity & Deposit Company of Maryland, surety on the stipulation for the appraised value of the petitioner's tug, in said sum of $2,875.00 with interest and costs, in a proceeding to limit the liability of petitioner, as owner of the tug Defender.

The Dominion Mill Company alone appeared as claimant and filed its claim and its answer to the petition, in the court below.

It is alleged in the petition and admitted in the answer:

1. That in December, 1918, the Canyon Lumber Company contracted to sell and deliver to the Dominion Mill Company, f. o. b., scow CLAIRE, then owned by the Canyon Lumber Company, at the latter's mill on the Snohomish River, 290 M feet of lumber and to charter to the Dominion Mill Company that scow and the use thereof for transporting said lumber to Port Blakeley.

2. That the Canyon Lumber Company de-

livered said cargo f. o. b. scow CLAIRE at its mill as agreed.

3. That the Dominion Mill Company requested petitioner to tow that scow and cargo from the mill on the Snohomish River to Port Blakeley, and pursuant to that request petitioner's tug DEFENDER took said scow with her cargo in tow from that mill in Everett bound for Port Blakeley, on December 11th, 1918.

It is further alleged in the petition but denied in the answer:

4. That said tug was seaworthy, etc., with sufficient power to perform the towage service requested.

5. That the tug proceeded with scow at 11 p. m. of December 11th, with a rising glass and smooth sea, from Priest Point, at the mouth of Snohomish River, for Port Blakeley.

6. That when the tug and scow were off Edmunds, a light wind and but little sea prevailing, the discovery was made that the scow had dumped part of her cargo.

7. That a large part of the cargo was picked up by petitioner, towed to Everett, and then impounded, and the Dominion Mill Company notified;

and that a part of the cargo was totally lost.

8. That the loss of cargo off the scow was without the fault, privity or knowledge of petitioner.

The prayer of the petition is, as usual, in the alternative, that the court adjudge petitioner and its tug not liable to any extent or at all for said loss and damage, or if found liable, that its liability be limited to value of tug and freight pending.

The answer sets up affirmatively:

1. That the tug negligently failed to use reasonable care in towing the scow, in that while in the Snohomish River the tug allowed the scow to come in contact with the bank of the river, cracking, straining and breaking the scow, causing it to leak, and notwithstanding the condition of the scow would have been disclosed upon examination, the tug failed to make such examination and proceeded into the waters of Puget Sound with the scow in damaged condition, with the weather unsafe for towing and failed to use reasonable care to keep the scow en route free from water but allowed her to become swamped and cargo to be dumped overboard, to the damage of claimant in the sum of $7,446.18.

THE ISSUES.

From the foregoing it will be seen that the issues raised by the pleadings were:

1. Want of privity or knowledge of petitioner as to loss and damage; and seaworthiness of tug.

2. Did the scow strike the bank of the river.

3. If so, did such impact cause the scow to leak.

4. The condition of the weather, wind and sea.

5. Was the tug negligent in the performance of the towage contract.

6. Seaworthy condition of the scow.

7. Damage.

REFERENCE.

The matter was referred to the United States Commissioner to take testimony and report the same to the court. No testimony was taken in open court.

Want of Privity and Knowledge of Petitioner, Seaworthiness of Tug DEFENDER.

Captain Jeffries, master of the tug, witness for petitioner testified that the tug was, at the time in question, in all respects properly tackled, ap-

parrelled, supplied, manned and equipped, had all the requirements of the law, was tight, staunch, strong, and seaworthy in every respect for that towage service, with sufficient power to perform that service, and had been duly inspected and that a certificate of inspection had been issued to her by the duly authorized officers of the Government. (Rec. 86, 87; Exhibit E).

McNealy, manager for petitioner, testified to the same effect and also to the effect that the petitioner was without privity or knowledge as to the loss and damage (Rec. 147).

This part of the case was uncontested by claimant; in fact the parties stipulated in writing, March 7th, 1921, (Rec. 22) that claimant waived proof by petitioner of the allegations of the petition and that no decree, if any, should be entered in favor of claimant or against petitioner in excess of the sum of $2,700.00, amount of appraised value of tug.

FINDINGS OF FACT.

On the issues the trial court found:

1. That the scow was seaworthy.

2. That the scow was taken by petitioner into open water and approximately 250,000 feet of lum-

ber was lost; something less than 50,000 feet delivered.

3. That there was no continuity of evidence as to the scow from the time of delivery (by the tug at destination) until the survey about ten days after, during which time she was on the beach.

4. That the scow collided with the bank of the river.

5. That the extent of the damage, if any, (to the scow by such collision) no one who testified saw.

6. That it must be concluded that either the running on the bank or the turbulent condition of the waters (of Puget Sound) occasioned the loss; and in either event the petitioner was at fault and should respond.

7. That the damage (to the salved lumber impounded at Everett) by reason of the rounding of the edges of the square timbers could not be compensated in the manner indicated (by labor of one man for one day).

8. That damage to claimant is more than twice the appraised value of the tug.

9. That cost of reconditioning the (salved) lumber and difference in value, it being a special

order, and place it either at point of shipment or destination, would be as much at least as the value of the tug and that for such expense the claimant could recover in any event.

10. That it was the duty of petitioner to deliver the cargo at Port Blakeley and it could not relieve itself from liability by placing the timbers in a boom at Everett and notifying the claimant of that fact.

11. That under the statute for limitation of liability, the liability should be limited to the value of the tug.

SPECIFICATION OF ERRORS RELIED UPON.

I.

Did the scow strike the river bank?

The 3rd Assignment of Error.

II.

If the scow struck the bank, did such impact cause it to leak?

The 1st and 4th Assignments of Error.

III.

Was the loss due to the turbulent condition of the waters of Puget Sound?

The 4th Assignment of Error.

IV.

Was the tug negligent in the performance of the towage service?

The 5th Assignment of Error.

V.

Seaworthiness of the scow.

The 1st and 2nd Assignments of Error.

VI.

Duty to tug under towage contract.

The 7th Assignment of Error.

VII.

Damages.

The 6th, 8th, and 9th Assignments of Error.

VIII.

The decree.

The 10th and 11th Assignments of Error.

POINTS OF LAW AND FACT.

I.

Did the Scow Strike the Bank of the River?

As to the 3rd Assignment of Error:

The substance of the claimant's testimony is that the scow went *up against the bank* of the river.

Claimant's testimony in detail is:

Stafford Wilson, employe of the Canyon Lumber Company:

> (From the mill dock) Did not watch the tug make fast to the scow (Rec. p. 30); started toward the mill, stopped and looked at scow—she was on the bank of the river, *up against the bank* of the river (Rec. p. 30-31)—saw her *against the bank, she was moving* (at the time), *don't know whether she was moving with the current or with the tug;* it seemed to be mixed up in some way; could not say how long she was there—I just looked a few minutes. Could not state how long she was—I turned and went to my work (Rec. p. 31), could see the scow and tug, I should judge a quarter of a mile where I seen her ashore (Rec. p. 32); quarter of a mile, somewhere in that neighborhood (Rec. p. 36); scow *struck* the right bank of the river; couldn't say which end the tug was on or whether she was on the side at that time; couldn't say whether or not the tug was between witness and the scow; watched three or four minutes; think she was up against the bank; couldn't say that she seemed to be in any distress (Rec. p. 37).

Percy Ames, employee of Canyon Lumber Company:

> I saw the scow at the bank (Rec. p. 43), saw them *when they ran up to the bank;* distance from the mill hard to guess, but I should think it was close to quarter of a mile, it might have been less. Don't remember on which side she was being towed by the tug but it would put the scow *against the bank;* stayed there until they had *released* her from the bank; she might have been there a minute or half a minute, hard to remember—I know they *just swung around to the bank and went down the river;* saw her go *up against the bank;* just at that time he was stopped; he was practically in, really broadside, he was two-thirds broadside to the river when he *touched the bank;* after he *touched the bank* he got right around, he did not stop any more than to square himself in the river and go again (Rec. p. 43). It was high water, just started to ebb (Rec. p. 44); photo, Exhibit B, discloses the place where the scow went *up against the bank,* it takes in sufficient scope of the river to include the place where the scow came up against the bank; in the photo, Exhibit C, the arrow points to where the scow came against the bank (Rec. p. 44).

This is claimant's entire case as to the scow striking the bank. It offers no testimony as to the force of the blow or impact, as to any rebound from that blow, or imbedding in mud or impinging on a snag, such as to require a "pulling off," or noise or report as to crashing timber, or swaying of the pile of lumber on the scow, or excitement or scurrying around on the tug.

Claimant's case, at most, discloses what is known among mariners as a case of "touch and go."

The substance of petitioner's testimony is that the scow did not touch the bank at all.

Petitioner's testimony in detail is:

Captain Herbert Jeffries, master of the tug:

> Never came in contact with the bank at any time. The only trouble when you get alongside the scow is you shove ahead, and there is a tendency to shove sideways to a certain extent, but the tail end of the scow load rubbed the tree limbs that overhung the bank of the river, that is the load, the load of lumber on the scow (Rec. p. 89). If the scow had come in contact tact with anything I certainly would have known it. You take a loaded scow and if it comes in contact with anything that has a tendency to stick, it will break the lines of the boat (Rec. p. 89) * * * This line leading aft, you push her along (with), and if she comes in contact with anything it will break that line every time, don't make any difference how big the line is. The line was not broken that time. Most certainly would have known on the tug whether or not the scow came in contact with the bank if the blow or contact or impact was sufficient to raise the guard of the scow when she was loaded (Rec. p. 90). Am positive I hit nothing coming down the river from Canyon Lumber Company's mill to Priest Point. The only thing, as I stated before, that lumber hit the limbs of the trees on the stern end; neither scow nor tug came in contact with any obstruction from the mill to Priest Point; didn't come in contact with anything to notice, to do any damage;

if we had it would have showed some effect by 11 (p. m.) while lying at Priest Point (Rec. p. 93). Going down stream from the mill tightened his lines. When I stopped to tighten the lines then she drifted in the stream some distance, yes. I backed up the boat, stopped the headway of the scow to a certain extent—width of slough 225 feet, width of scow 32 feet, width of tug 22 feet. Plenty of room in middle of stream to navigate with scow at her side (Rec. p. 96). The aft end of the load scraped the trees as we went along. Was standing in stream crosswise or at an angle of 45 degrees, should judge, not more than five minutes. If I struck the bank with the scow the line I was pulling on would break. If the line was not tight it would have a greater tendency to break. It would break quicker. You would have the boat going, and the scow coming back, at the same time. Cannot slack the boat without slacking my line and hold the boat there. Had a man on top of the load (on the scow) (Rec. p. 97).

Harry Garner, in tug's deck department:

(Upon leaving mill dock) After taking in slack, was up on that load on the scow for purpose of watching * * * to keep an eye on anything, to be a lookout; just as soon as we tightened up the lines * * * then I climbed on top of the load immediately; we were (then) not very far off from midchannel. Don't think scow had at any time previous thereto been near the bank of the river. There was contact with trees on the bank, naturally brushed the trees; on a boat running light we would do that. Of course we did. *The scow did not come in contact with any obstruction at any time from the mill to Priest Point* (Rec. p. 131).

It will be borne in mind that the witnesses for claimant were viewing the movement of tug and scow from the dock of a mill, which, according to their own statements, was at least a quarter of a mile from the place where they say the scow went up against the bank; and further, that the tug and the scow with an eight-foot load on her were between those witnesses on the mill dock and the particular place in the bank of the river they say the scow touched.

Not only has the claimant failed to sustain the burden of proof, but the scales tip in favor of petitioner.

The evidence of the surrounding circumstances, as will be seen as our argument develops, substantiates the positive testimony of petitioner's witnesses that the scow did not strike the bank of the river.

II.

If the Scow Struck the River Bank, Did Such Impact Cause It to Leak?

As to 1st and 4th Assignments of Error:

That the scow en route from Priest Point to Port Blakeley leaked is admitted, but the imme-

diate question is, was that the result of the scow striking the bank.

Claimant's evidence was to the effect: That the loaded scow went up against the bank (though which end of the scow touched the bank its witnesses say they do not know); and that a fortnight after the scow was delivered at Port Blakeley, to claimant, with no continuity of evidence as to the scow from the time of such delivery until such survey about ten days after, during which time she was on the beach—as the trial court found (Rec. p. 154). Claimant's survey of scow disclosed a damaged condition; and that such damage was confined to the stern of the scow and adjacent to the stern; from which (notwithstanding that as to the force with which the scow struck the bank, Wilson, its witness, didn't know whether the scow was moving with the current or with the tug (Rec. 31), from which, we say, claimant would have the court draw the conclusion that the damage was caused by the scow striking the river bank.

It is significant that no showing is made by claimant as to what care the scow received at its hands at Port Blakely during that fortnight (Dec. 13th to 26th), when the scow was in its custody, though that port was the place of claimant's opera-

tions as a manufacturer and exporter of lumber, and the degree of care or negligence taken of the scow was peculiarly within the knowledge of claimant.

As petitioner's evidence, as will be seen, showed that the scow went down the river, from mill to Priest Point and thence to Port Blakeley, bow first, in tow of the tug, it becomes pertinent to inquire: What was the condition of the scow at Port Blakeley and upon its return to Everett, and where the openings in scow were located.

Claimant produced three witnesses, Clark, Johnson and Hancher, who saw her on the beach at Port Blakeley, and who testified as follows:

Clark, lumber inspector:

> Saw scow on beach, they were draining water out of it; the Jap held a lantern down through the hatchway and you could see the light shining through the crack, on the corner, in the top seam, crack 2 or 3 feet long; shoved my ruler through it (Rec. p. 25); it was at night time when I saw the scow on the beach; didn't examine her, but saw this, an open seam on one end of the scow, top seam, 14 or 15 inches from top of scow; that was the only seam he saw (Rec. p. 26), ran lengthwise of the scow (Rec. p. 27).

Johnson, boat-builder:

> At time I went down to examine this scow there was 3 or 4 feet of water on outside, at least

18 inches in hold; had a skiff and went all around scow; found on one corner oakum was out of there, and some seams were open at least three-quarters of an inch (Rec. p. 81); it was a little way inside, the guard was tore off from one end and whole of the oakum was out, 3 feet long and that is on side of scow; on the end of the scow, same end, there was an opening but not quite so large, and I could see along this opening probably 2 feet that oakum was entirely out and it was an open hole; didn't examine inside of scow—looked down hatch is all; had no occasion to look inside of bulkhead, was looking at outside where water might have gone into scow; found that and I thought that was enough to sink a scow at the time she was out; couldn't tell whether this opening had been caused by pressure from within or without, most likely it had (*sic.* Rec. p. 82, line 18); the sea was so big and the oakum was loose, it would have come out very easy with the pressure of the storm, or anything from outside would pull it right out. Couldn't tell whether this opening in seam had been caused by something from without, by the water striking it from without (Rec. p. 82).

Offers copy of his written report on survey.

The seam on side was probably 4 or 5 inches below the guard, 15 or 16 inches below deck (Rec. p. 82); no doubt the scow was well constructed when she was built, but as I say the scow had got to be quite an old scow and I think that the planks had pulled apart and caused this opening, can't tell how or when, but they pulled apart; in places where the planks, you see there they get kind of worked down and the corners kind of broken off, *enough to take water in if awash;* couldn't say there was any

indication from examination at that time that she was in collision with bank of river or some resisting mud, with some obstruction in her navigation, that caused her to open her plank (Rec. p. 83).

Hancher, launch man:

(At Port Blakeley) I moved the scow from the dock over there to the beach. She was full of water and put her alongside the grid-iron or a bunch of piling on the beach there, a gravel beach; and she lay right in front of my house (Rec. p. 66).

Went down and examined the scow; never made a thorough or close examination. Saw several seams open and water running out. Noticed seam open at one end and also several seams that were open at that time in making examination and when we looked at her just supposed scow had become full of water lying on the beach, force of water inside had forced the caulking out. Sometimes water inside will push plank off. Noticed one place close to bottom seam, seam was 4 or 5 feet, caulking out at that time (Rec. p. 66); also seam at corner; a big seam along about close to bottom, about middle of scow (Rec. p. 67).

Scow caulked (at Port Blakeley) before they returned her and those seams fixed up before they returned her to the mill (at Everett) (Rec. p. 71).

I noticed the scow had several seams open in different places, and what I believed at that time was that the caulking had been forced out from the scow after she was put on the beach (Rec. p. 70).

If he hit the bank with the corner of the

scow, then he has got to stop right there; and the current running at that time, after high water, the current running down stream, the scow turned around and came bump up against the bank sideways; that would not have force enough, I should think, to hurt the scow any, the sides of the scow are very thick, probably 6 or 8 inches thick (Rec. p. 68).

I would state that if the scow came in contact with the bank, headed down stream, or if headed toward the bank, that scow has a shear on her or cut-away underneath, and it would be very apt to come in contact with the bank above the water line (Rec. p. 69).

Q. And what tendency would that have on that scow, loaded with 294,000 feet of lumber, could you tell?

A. Well, you might run into the bank a dozen different times and each time you would have a different effect on your scow. It all depends upon what the scow would come up against (Rec. p. 69).

In addition to this testimony, claimant offered further evidence of the scow's condition on her return to Everett, as follows:

Stafford Wilson, employe of Canyon Lumber Company:

Made an examination of scow after her return to Canyon Lumber Company; fixed her; she had a crack opened up in front, in corner, in one of the corners; opened up about 10 feet, 3 or 4 inches wide (Rec., p. 32).

Q. Just an opening in a seam so as to

make a seam in the scow or was there *any bruising of timbers* in there that showed evidence of having been split or broken?

A. No, it was in the caulking where the opening was; about 15 inches from the top of the scow (Rec. p. 32).

One end of her was all cracked in; ten feet from end of scow back, 15 or 18 inches below the deck, some timbers split inside, one of the gunwales in there; the first one inside there was a timber split about 30 or 40 feet back, the same end where the opening was on the outside, new split; split timber is in there (Rec. 38); remains in scow, not split from driving drift bolts through; I suppose there was some strain or something; that would be the only way it could be done, some strain; and these spikes would naturally on one half of the wall, would split the timber; this open seam on outside and this split of gunwale on inside of end of scow that had the open seam, was the end that had the name on stern of vessel, across the end of the vessel (Rec. p. 39); don't know how long scow lay on beach at Port Blakeley or how they handled her there; haven't any personal knowledge that the injury I saw was due to the fact that she went up against the bank (Rec. p. 40); cause of opening he saw, there might be a good many causes; if she got on a bar, was heavily jammed into something with heavy load on; don't know, quite a few things; not by wash of the sea (Rec. 41); know the river bank has soft places, lots of drift wood comes down there; could not say whether it was filled with drift at that time (Rec. 42).

Recalled:

Shown photo, Exhibit D, marks Exhibit D

with red ink, indicating where crack was when scow returned to Canyon Mill (Rec. 46); also indicates where gunwale was split (Rec. 47).

Cement shown in Exhibit D, considerable distance below place where seam was (Rec. p. 48).

Percy Ames, employe of Canyon Lumber Company:

(When scow was returned to Canyon Mill) Saw the crack in her; cannot remember exactly just what he saw; knows there was a raised deck for a number of feet; the opening in her was something that would be plainly visible from outside of scow, if you were down low enough to look at it; could see the scow was raised up; doesn't think they could see the crack unless on same level with the scow (R. 44).

In photo, Exhibit D, the bow of the scow in the foreground is the end of the scow he subsequently saw in damaged condition, the end that has name on it (Rec. p. 45).

W. C. Niemeyer, lumber inspector at Canyon Mill:

We try to get a rake (on scow in loading) of 3 or 4 inches to tow, one end a little higher than the other.

No such thing as head or stern (of scow). We load them whichever way they come in; and he (tug) will hook on to what I would call the light end, have that in front (Rec. p. 50).

(On return to Everett) I found there was a break in the end, the header lifted up, a header is a 14-16 (Rec. 51), that was lifted up

on this front where the cargo is, and around the end, ten or twelve feet on the side and on the end; a distance of 10 or 12 feet on the side, a distance on the end of 6 or 8 feet (Rec. pp. 51, 52); noticed one of the bulkheads was lifted up also—the gunwale—wouldn't say broken, but split, lifted up—didn't notice whether broken, lifted up 20 or 30 feet (Rec. p. 52).

Opening in end could be plainly seen from outside of scow, if you were down on a level with it, you could see it; if you got down and looked, that is the only way you could see it; you would have to lay over the end of it; would not say you could see it plainly (Rec. pp. 52, 53).

Cannot say there was a split in the timber (gunwale); there was an opening in that seam (Rec. 55); I still say there was an opening in that timber 30 or 40 feet long, cannot say whether split, would say crack (Rec. p. 56); the end of the scow that was damaged was the "name end" (Rec. p. 56).

McNealy, manager for petitioner, who went down in the scow with Niemeyer in the spring of 1921 (Rec. pp. 148, 149), according to his own testimony and that of Niemeyer (Rec. p. 55), requested Niemeyer to show him the crack in the gunwale; says that he made a special examination to discover the crack and found none, none was pointed out to him by Niemeyer, and that there was none there (Rec. p. 149).

And this failure of Niemeyer to direct McNealy's attention to the alleged split timber was

not for the reason that there had been any renewal or changed condition of that gunwale or its timbers, no such reason is in evidence.

Niemeyer's testimony itself was self-contradictory and unsatisfactory. He denied remembering what his testimony had been on a former trial in an action in the state court between the Canyon Lumber Company and the claimant, involving the loss of this same cargo, as the result of which suit the Dominion Mill Company was obliged to pay for the entire cargo of lumber (Rec. p. 110). The following extract from his testimony will disclose his attitude and the probative value of his testimony:

> A. I don't remember these records (of former trial).
>
> Q. I am going to ask you each question and you can answer.
>
> A. I cannot answer anything there. I answer what comes up now.
>
> Q. I want to know if you remember this—
>
> A. I don't remember it. * * *
>
> Q. The next question, "Q. Was that a split in the timber itself? A. Yes sir." * * *
>
> A. Do I have to answer this?
>
> Q. Yes.
>
> A. I cannot recollect what I testified to (Rec. 54).

Whatever the condition of the scow was at Port Blakeley, whatever her condition was on her return to Everett, the claimant's witnesses, Wilson, Ames and Niemeyer, all fix definitely that the crack on the side and the hole in the end of the scow was as indicated by Wilson in photo, Exhibit D, at the end of the scow where the name is (technically known by the Custom House as the stern, Hancher, Rec. p. 77), and on the port quarter of the scow looking forward from that stern, and that the alleged split gunwale was at the same end and side.

That is to say that all the damage to the scow as shown by claimant was at and near the stern.

We submit that with the weight of 290,000 feet of lumber on the scow, any blow or pressure on the stern would have broken the timbers of the scow before it would have lifted the header with the weight of that cargo on that end (right on the floor of the scow, Rec. p. 93); but Wilson for claimant testified that there was no evidence of bruising of timbers of the scow where the seams were discovered opened.

In view of this testimony as to the location of the damage to the scow, it becomes important to determine which end of the scow went down foremost, when the tug took her in tow alongside at Canyon

mill, which end was down stream in towing.

Besides the name on the stern of the scow, the name of the scow was also painted on each side of the scow, on the corners, on the bow end or other end of the scow (Wilson for claimant, Rec. p. 34).

For the claimant:

Wilson testified:

He didn't know how the scow was headed, with respect to name on her stern as she hit the bank (Rec. pp. 36, 37) or when towed away (Rec. p. 40).

Ames testified:

He didn't observe which end where the name is on the scow or whether that was headed down stream (as she was towed away from Canyon mill) (Rec. p. 43).

Niemeyer testified:

He didn't notice when the scow was loaded at Canyon mill which end with reference to name on scow was headed down stream; did not pay any attention to that, on account of both ends being the same (Rec. 50).

For the petitioner:

Jeffries, master of the tug, testified:

When I went up to the mill, the first thing I naturally would do would be to look amongst the scows and see where the CLAIRE was; found her lying along the dock, at this dock;

noticed the name on the up-stream corner of the scow, and I went alongside—high end of scow was up-stream; made fast alongside of her and took her on my starboard side, and I pulled her out of there and started down stream (Rec. p. 87); the boat was alongside the scow; left the mill, at top of high water, slack water (Rec. p. 88).

Garner, for petitioner, testified:

Scow lay in a little notch in wharf (Rec. p. 129) (see Exhibit A); approached the scow on tug's starboard side; bows of tug and scow pointing in same direction; end of steamer was not as far up as the up-river end of scow (Rec. p. 129). Diagram G indicates relative position of tug and scow and how made fast by lines (Rec. pp. 129, 130). In this position, with these lines out, the scow was moved from its berth at the dock by the tug; and the relative position of the lines was not changed until they got to Priest Point. Saw the name on the end of scow in tightening up the stern line, the name CLAIRE; we stopped down there to shorten up our lines and we shortened up on our headline and sternline, and I had to step over to the starboard to shorten this line, and I noticed there was a name on there (Rec. 130). End of scow opposite to the end with the name on, was always forward in towing, either alongside or by line (from mill to Port Blakeley) (Rec. 132).

Barkman, master of CHICAMAUGA, for petitioner:

That immediately after the accident, he was called to the tug and found the towing bridle made fast to the towing bitts at the bow of the

scow, at the end with the name on the side (Rec. p. 144).

These statements by Jeffries, Garner and Barkman on the point under immediate consideration are uncontradicted and unimpeached.

Assuming for the sake of argument, that the scow did strike the river-bank, it must have been with her bow end; and for the bow striking the bank to have the effect of lifting the header on the stern of the scow with the weight of the cargo on that end, and of causing the other damage at the stern, would be against physical laws.

With all the damage sustained by the scow at the stern and on her port quarter, abaft midships on the port side, and with the scow being towed bow first down stream, whatever the findings of the court as to the scow striking the river bank, the court must find, in view of claimant's affirmative showing that it couldn't be told from the dock whether the scow was moving with the current or with the tug, and in view of the absence of any showing as to the force with which the scow struck the bank, if she did so, the court must find that there is no evidence in the record that damage was sustained by the scow by reason of such impact with the bow of the scow.

The burden of proof is on the claimant.

An engagement to tow does not impose either an obligation to insure, or the liability of a common carrier. The burden is always upon him who alleges the breach of contract of towage to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness to his injury in the performance. Unlike the case of common carriers, damages sustained by the tow do not ordinarily raise a presumption that the tug has been in fault.

The Steamer Webb, 81 U. S. 406, 414.

The Propeller Burlington, 137 U. S. 383.

Owners of tow and cargo cannot maintain an action for loss against a tug or her owners without proving negligence. The damage to tow or cargo raises no presumption against the tug.

The J. P. Donaldson, 167 U. S. 599.

We submit that the burden of proof was not sustained by the claimant.

III.

Was the Loss Due to the Turbulent Condition of Waters of Puget Sound?

As to the 4th Assignment of Error.

Condition of Wind and Sea, in Waters of Puget Sound. The Wind:

Hancher, launchman, for claimant, testified:

Left Port Blakeley that night he thinks at

one o'clock in the morning (Rec. pp. 72, 74); some time around one o'clock, maybe a little later (Rec. p. 73), doesn't remember the exact hour (Rec. p. 63); took three or four hours to get down (to Everett) (Rec. p. 72); got there about four or five o'clock in the morning, he believes, if he remembers right (Rec. p. 64).

(Coming out of Port Blakeley) It was blowing quite hard, should judge somewhere in the neighborhood of 20 miles an hour, possibly more; know that with my tug I would not attempt to go out in a wind like that was blowing at that time (Rec. p. 64).

The tug DEFENDER is probably 150 horsepower; mine only a gasoline boat of 76 horsepower; the DEFENDER *would be able to pull against that wind all right, with the scow and load* (Rec. p. 64).

At Edmunds blowing a gale of wind (20 miles is a gale if a man is trying to tow a scow up against it) (Rec. p. 72). The scow wouldn't necessarily stand up against that storm as long as the tug (Rec. p. 72).

Had been blowing hard at Port Blakeley (one o'clock that night, or maybe a little later) —blowing hard when I arrived at Everett, same as in Blakeley when I left. My opinion the storm was continuous throughout Puget Sound district; that there was a strong wind (Rec. p. 73); with a tow in such weather I would have tied up at Mukilteo. (Rec. p. 74).

Salisbury, of U. S. Weather Bureau, for claimant, testified:

(At the time in question) Weather conditions were the same in Everett as they were in

Seattle; barometer would be the same (Rec. pp. 120, 121).

Official weather report, of Dec. 11th, Exhibit 1:

No storm signals ordered for the 11th (Rec. p. 122)—

Velocity of wind at Seattle midnight of 11th, 13 miles;

At 1 o'clock a. m. of 12th, 15 miles.

At 2 o'clock a. m. of 12th, 16 miles.

At 3 o'clock a. m. of 12th, 15 miles.

At 4 o'clock a. m. of 12th, 10 miles.

At 5 o'clock a. m. of 12th, 8 miles

At 6 o'clock a. m. of 12th, 7 miles (Rec. p. 123).

Dec. 12th was a cloudy day with light rain, low fluctuating barometer and temperature above normal. A general south wind prevailed, at times from S. E. Highest velocity 34 miles an hour from south at 10:45 p. m. Average hourly velocity or movement, 10.4 miles; S. W. storm warnings displayed 8 a. m. for ensuing 24 hours (Rec. 100).

Jeffries, master of tug, for petitioner, testified:

Laid at Priest Point until 11 o'clock at night, and tide being right, I pulled out; at that time there was no sea, no sea a man would stop with a scow, a little chop, nothing to amount to anything (Rec. p. 88); wind 15 to 20 miles an hour (Rec. p. 89), 12 to 15 miles (Rec. p. 100); glass between 29.85 and 30, about 29.90 to be exact (Rec. p. 89). From time I left Canyon Mill, glass had tendency to rise slowly;

reached its highest point 11 o'clock p. m., when I pulled out (Rec. p. 89).

No storm signals at Everett (Rec. p. 95); had a barometer on board (Rec. p. 98); glass slightly rising (Rec. pp. 98, 99); if you have an ebb tide running out of Everett against 30 mile S. E. wind you will probably have a pretty good chop, but if you have a 35 or 40-mile wind with flood tide, blowing into Everett you probably would have no sea at all (Rec. pp. 99, 100).

Tug DEFENDER'S work sheet for the trip, Exhibit 2, shows:

Dec. 11th.

13.00 o'clock Tied scow to Priest Point dock, wind stiff S., bar. 29.80.

23.00 o'clock Left Priest Point with CLAIRE.

Dec. 12.

00.0 o'clock At edge of flats)Fresh 29.86
6.00 o'clock Highlands abeam)Stiff S E29.60

The Sea:

Jeffries:

At Priest Point that night there was no sea, a little chop)Rec. p. 88).

Hancher:

Q. Was the *water* on that night such as would make it dangerous to tow a scow such as the CLAIRE, loaded with lumber?

A. I know with my tug I would not attempt to go out in a *wind* that was blowing at that time (Rec. p. 64).

Q. With the wind such as you experienced on leaving Port Blakeley, would you say that

it made a *sea* such as was not safe to tow in?

A. It was not safe to tow that night, not with a loaded scow, that night (Rec. p. 74).

Wouldn't state how long wind had been blowing before he left Port Blakeley; doesn't remember whether it was blowing all night or not; doesn't remember whether the wind came up suddenly at one o'clock or had come up before (Rec. 74).

With the wind and tide in same direction, there was no heavy sea (Stipulation, Rec. p. 146).

There is no evidence of a wind of any force prevailing in the early evening of Dec. 11th, prior to eleven o'clock. p. m.

The wind at 11 p. m. was blowing 13 miles an hour, increasing to 16 miles at two o'clock and thereafter constantly decreasing in velocity to 8 miles at five o'clock and to 7 miles at six o'clock on the morning of Dec. 12th (Rec. p. 123).

There is no evidence of any unusual sea running at 11 p. m. from any previous prevailing wind, or between 11 p. m. and 5 a. m. further than the *opinion* of Hancher, a gasoline boat operator, when questioned as to the sea made by the wind, that it was not safe to tow that night with a loaded scow; but he also was of the opinion that the tug DEFENDER would be able to pull that scow and cargo against

that wind all right (Rec. p. 64).

Captain Jeffries, master mariner, says there was a fairly good sea on, but no sea that scow should not have lived in; had taken scows through seas a whole lot worse than that from Union Bay, B. C., to Seattle, loaded just as heavy with coal, many times (Rec. pp. 107, 108).

Between 11 p. m. and 5 a. m. the tide in the waters of Puget Sound was ebbing (Stip., Rec. p. 146). The ebb flows to the south from Saratoga Passage and Port Susan through Possession Sound, but to the south of Possession Sound and thence on to West Point and south of that the tide ebbs to the north; from a point south of Double Bluff (Skagit Head) to Richmond Beach, a distance of, say, six miles, the tide had been ebbing since 11 p. m., in the same direction in which the wind was blowing, to the north, and in these waters, with the wind and tide in the same direction, there would be no sea kicked up (Stip., Rec. p. 146).

When the tug and scow were coming away from Priest Point, the wind and tide were in opposite directions, which caused a choppy sea, as testified to by Captain Jeffries (Rec. p. 88); but when well south of Double Bluff, coming south, the wind and

sea were going in the same direction, as explained above.

Hancher, for claimant, testified that on his way from Port Blakeley to Everett that night, when he got to Edmunds he noticed lumber all over the water, and lumber from there to Mukilteo Bay (Rec. p. 64).

Edmunds was half way to Everett from Port Blakeley (Rec. p. 72).

This would bring him at Edmunds about three o'clock a. m. if there was any certainty in the time given by him as to his departure from Port Blakeley and his arrival at Everett; but he is very uncertain as to both departure and arrival; says that he doesn't remember the exact hour he left Port Blakeley (Rec. p. 63) and that he got to Everett about four or five o'clock, he believes, if he remembers right.

However that may be, from his testimony it may be inferred that the lumber had been spilling for some little period of time before the lights on the scow disappeared, or else it had all spilled south of Edmunds and had drifted north with the combined force of wind and tide, setting north.

It was between five and five-thirty in the morning when the tug found the load had gone off the scow (Rec. p. 91); Garner had seen the lights on the

scow some fifteen or twenty minutes before (Rec. p. 136); they were then off Richmond Beach, 18 miles from Priest Point (Rec. p. 100), and had been in water, where there would be no heavy sea running, for two or three hours.

We submit that the record shows no stress of weather, of wind or sea, such as to account for the disaster which befell the scow between 5:00 and 5:30 on the morning of December 12th (Rec. p. 91).

As we said under Point II., the burden of proof was upon the claimant.

The Webb, 81 U. S. 406, 414;
The Burlington, 137 U. S. 383;
The J. P. Donaldson, 167 U. S. 599.

This burden was not sustained by the claimant.

The trial court without finding specifically that the damage to the scow causing her to leak and thereby lose her cargo, was caused by the scow striking the bank of the river or by the turbulent waters of Puget Sound, did find that in either event the petitioner was at fault and should respond, which is but to say, given the premise in the alternative, the conclusion follows.

But there is no evidence of any damage to the scow caused by its striking the bank and the court

was not able to, or in any event did not, so find the fact to be.

Nor did the court find that the damage was caused by the turbulent waters. It did find that the scow entering the open waters of Puget Sound, the lumber cargo was lost.

Here again the court met with a difficulty. It could not, or in any event it did not, find that the turbulent waters were the cause of the damage to scow.

But having found the scow seaworthy (which finding we discuss under Point V.), it appears to have drawn the inference that the damage to the scow was due either to the one cause or the other, and that in either event the petitioner was at fault and should respond.

We submit that, without a preponderance of the evidence in favor of claimant, that such damage was actually due to the one cause or the other, no inference can be substituted for such evidence and that no conclusion of fault of petitioner can rest upon a mere inference.

The burden being upon the claimant, it is incumbent upon it to satisfy the court by evidence having a greater weight than that offered by the peti-

tioner, that the negligence of the tug occasioned the damage complained of. Where there is no way of ascertaining, with any degree of certainty, that the tug caused the damage, to say that she did so would be to substitute inference for proof. The strongest statement permissible under the evidence is that she might have done so. But speculation and conjecture have no place in an investigation of this character; and where the proof is evenly balanced between two theories, it is quite clear that claimant cannot recover.

The Nellie Flagg, 23 Fed. 671.

In *The R. B. Little,* 215 Fed. 87, C. C. A., 2nd Circuit, a case of damage to a tow, the court said:

> It seems to us that the burden is on the libellant to show some negligence on the part of the tug and that until this is done, the burden of proof does not shift. There is nothing in the testimony here to show that the tug was guilty of fault. It is all left to guesswork and speculation. The argument is that the barge was injured at some time, probably while being towed by the tug; ergo, the tug is liable. In other words the tug may be held liable for an injury which she did not cause or aid in causing. No one knows or pretends to know how the injury was caused and until some proof is produced that the tug caused it, it seems to us she should not be held liable. The rule laid down by the District Court practically makes the tug an insurer.

As was said by the court in *Grant vs. R. R. Co.,* 133 N. Y. 659, 31 N. E. 220,

> No facts are shown from which the cause of the accident can be more than guessed at. There is food for speculation and wonder, but there is no evidence as to the cause.

Cited in Chi., etc., Ry. Co. vs. O'Brien, 132 Fed. 593, with other cases.

IV.

Was the Tug Negligent in the Performance of the Towage Service?

As to the 5th Assignment of Error:

The negligence charged by claimant in its answer is:

1st. The tug allowed the scow to strike the river bank, thereby cracking, straining and breaking the scow.

2nd. Failure on part of tug to examine the condition of the scow after so striking, which examination would have disclosed that the scow had been so cranked, strained and broken.

3rd. Failure on part of tug to keep the scow free of water.

As to the first charge, we have discussed that under Points I. and II. of this brief.

As to the second charge, failure to examine scow,

Jeffries, master of tug, testified:

We sounded the scow at mill, found 3 or 4 inches of water, not enough to enable siphon to lift it (Rec. p. 90).

(At Priest Point.) Didn't sound again, but she was apparently in the same condition as when I left the mill (Rec. p. 91).

(At Priest Point.) This scow was apparently in the same condition leaving Priest Point (11 o'clock p. m.) as when it arrived there in the afternoon (1 o'clock) (Rec. p. 92).

I walked around the side of her, along the outside of her, with a light to see if there had been any change, see which was the high or low end and see whether she had gone down any at the low end (Rec. p. 92).

Her freeboard was 26 inches at high end, and 20 or so on low end, 6 inches difference in two ends (Rec. pp. 92, 93).

Made no examination of scow before I made fast to her (at mill), took her in just whatever condition she was left there for me, assumed it was good, seaworthy condition from what I could see and the way the scow was loaded (Rec. p. 99).

Never observed anything wrong (en route from Priest Point), never made any investigation till he saw the light go out. When the light was gone I went back and looked at her and the load was gone (Rec. p. 105).

Perkins, for petitioner, testified:

> Was within 400 or 500 feet of scow at Priest Point. Took particular notice, she seemed to be setting on a level keel all right (Rec. pp. 85, 86); about 3 o'clock in the afternoon couldn't see them working any pumps (Rec. p. 86).

Garner, for petitioner:

> Condition of scow at Priest Point same as at mill (Rec. p. 132).

As to the third charge, failure to keep scow free from water:

Claimant in its answer, Paragraph VI., affirmatively alleges that the tug negligently failed to use reasonable care in handling the scow, in that while towing it down the Snohomish River, the tug allowed the scow to come in contact with the bank of the river, thereby cracking, straining and breaking the same and causing it to leak, and, notwithstanding the condition of the scow, which would have been disclosed by examination, the officers of the tug failed to so examine the scow and proceeded into the waters of Puget Sound with the same in such damaged condition when the weather was unsafe for towing, and failed to use reasonable care to keep the scow while en route (in Puget Sound) free from water.

The gist of the charge, it will be observed, is that through the tug's negligence the scow struck the river bank and sprung a leak, and in that leaky condition of the scow the tug proceeded with it into the waters of Puget Sound, where the weather was unsafe for towing, and failed to keep it free from water.

It was not the weather or the turbulent waters produced by that weather which is charged as causing the leak.

The weather and turbulent waters of Puget Sound only enter as elements swamping a leaky vessel subjected to them.

The premise in claimant's contention is always the leaky scow, made so by contact with the bank of the river through the tug's negligence.

That the scow leaked and swamped there is no dispute.

The cause of that leak was not shown by the evidence to have been caused through any negligence of the tug.

That premise of claimant was not established by any evidence whatever.

Having examined the scow at Priest Point and

finding her all right, the tug at the proper tide passed out of the river into the waters of Puget Sound en route for destination.

He then pursued the course which Hancher, witness for claimant, said was proper, went on without further examination, impossible en route.

Hancher, for claimant, testified:

> If I had known the scow was all right when I left the river, if I could see the scow after I was out, was outside the river, I would say the scow was all right, if I did not see a list in her (Rec. p. 64).
>
> A man would never out in weather like that, towing on a night like that, know whether she was leaking or not. You cannot see the scow (Rec. p. 74).
>
> A man in towing a scow, he generally has it anywhere from 300 to 500 feet of tow line fast to her and he starts out knowing or considers she is seaworthy and he tows on and he don't go back to see whether she is leaking or not, unless he ties up, and he would not have known. If he suspicions the scow is leaky he would go to shelter with her (Rec. p. 74).

Then when the light on the scow disappeared, warning those on the tug of trouble, the master of the tug immediately shortened hawser and, finding the load spilled, sent for assistance.

The wind on the night in question, had reached its maximum velocity of sixteen miles an hour at

two o'clock a. m., which was four miles an hour under what, to-wit twenty miles, the Government meterologist in charge of the weather bureau at Seattle, witness for claimant, testified (brought out on redirect examination by claimant) becomes dangerous to towing, that is becomes a hindrance—that that was the general understanding he had from towboat men (Rec. 122).

Outside of the testimony of Hancher, witness for claimant, whose experience was that of a gasoline boat operator, who testified that he would not have gone out that night with a loaded scow but who also testified that the tug DEFENDER would be able to pull against the wind (on that night, with that scow CLAIRE and 290,000 feet of lumber) all right, there was no testimony on the part of any witness of nautical experience and good seamanship or otherwise condemning the judgment of the master of the tug in leaving Priest Point and entering the waters of Puget Sound—with the condition of wind and weather prevailing.

And in the absence of such testimony it cannot be held that the tug or petitioner is liable because the tug encountered rough weather, if it did.

> "Masters of tugs are not to be charged with negligence unless they make a decision which

nautical experience and good seamanship would condemn as presumably inexpedient and unjustifiable at the time and under the particular circumstances."

The Nannie Lamberton, 85 Fed. 983, C. C. A. 2nd Circuit.

Even assuming for the sake of the argument that the master's decision to proceed on the voyage from Priest Point was an error in judgment under the particular circumstances existing, neither the honesty of his intent nor the reasonableness of his discretion being impeached, the petitioner would not be liable for the loss complained of merely on account of that error of judgment.

"Such an error of judgment would not be a fault."

The William E. Gladwish, 196 Fed. 490, C. C. A. 2nd Circuit.

V.

Seaworthiness of Scow.

As to the 1st Assignment of Error.

The scow was chartered by claimant for the purpose of transporting a cargo of lumber from the Canyon Mill to Port Blakeley, and as such charterer the claimant was owner *pro hac vice.*

Claimant attempted to show that the scow was

seaworthy and properly loaded.

Claimant's evidence was to effect: that it was Niemeyer's duty to load and inspect the scow (Wilson for defendant, Rec. 35); and Wilson's duty to attend to anything necessary to be done (Id.). And that the scow was absolutely seaworthy (Niemeyer, Rec. 51). But neither Wilson nor Niemeyer were shipbuilders nor seafaring men; Niemeyer's testimony was incomplete, and was objected to at the time on that ground (Rec. pp. 50, 51, 52).

It is admitted that the scow, five or six hours after leaving Priest Point, became partly submerged. A damaged condition, sufficient to cause the same, was disclosed at a survey some fortnight thereafter at Port Blakeley.

But the actual cause of that damaged condition, when and where and how it came about or that such condition and not something else caused the loss of the lumber from the scow (Hancher, for claimant, thought that condition arose after the delivery of scow at Port Blakeley, Rec. 70 lines 4-7) is not shown by claimant, though the burden of making such showing, if true, is upon it.

There was no stress of weather, wind or sea, sufficient to cause that condition, after leaving Priest

Point, and no intervening cause on the river between the mill and Priest Point.

The claimant has failed to sustain the burden of proof.

If we were to indulge in theories to account for the disaster, it might be that the cargo first shifted owing to poor loading or want of proper stanchions on the scow to keep it in place, and then gradually spilled, listing the scow to starboard and submerging her stern, when she filled through the hatches; or that the scow, being old, worked in the seaway and puked the caulking out of her seams, filled with water and, listing, spilled her cargo; or that some of her seams were open before the tug hooked on to her at the Canyon mill and that when she got in the wash of the sea she leaked through those open seams; in any of which cases it would be a case of an unseaworthy scow.

Be that as it may, in the absence of any evidence of a sufficient intervening cause to explain the spilling of the cargo, the presumption is that the scow was unseaworthy at the commencement of the voyage, and the claimant, being charterer and owner *pro hac vice* of the scow and charged with the knowledge of her condition at that time, cannot be

heard to complain of a loss resulting from such condition not communicated to the tug before the commencement of the voyage or at all.

If it should be urged that it was the duty of the master of the tug to see that the scow was seaworthy and fit to proceed to sea before commencing the voyage, our answer is:

That the master of a tug is not responsible for the stowage of the cargo or the effects of bad stowage, where he has taken no part in the operation and has had no notice of bad stowage; and as to the condition of the scow itself, unless advised by those engaging his services of any unusual condition, the master is not expected to make an examination of the hull of the scow.

In the instant case, the master testified that he sounded for water at the mill and there was not enough for the siphon to lift (Rec. 90), that there was no change in condition of scow at Priest Point (Rec. 92, 93), and that from what he could see of the scow he assumed that she was in good seaworthy condition (Rec. 97).

If the hole in the stern of the scow, discovered at Port Blakeley, was in the scow at the time of her loading at Everett, it was where you could see

it only if you were low enough down to look at it, couldn't see it unless on same level with the scow (Ames, for claimant, Rec. 44); could be plainly seen from the outside if you were down on a level with it; if you got down and looked, that is the only way you could see it, you would have to lay over the end, would not say that you could see it plainly (Niemeyer, for claimant, Rec. 52, 53).

That was because there was a sheer or cutaway at the end of the scow; the hole was about fourteen to fifteen inches from the top (Clark, for claimant, Rec. 26); fifteen to eighteen inches below the deck (Wilson, for claimant, Rec. 38).

The end of the scow, as it lay in the little notch in the mill dock, would not be visible, it was too close to the dock, at the stern, which was the down stream end of the scow in the dock (Exhibit A).

Hancher, for claimant, who tows for claimant, (Rec. 60), says:

> "Anybody that tows a scow and wants to use precaution at all ought to examine the scow; take up the hatch and go down inside to see if there is any water in her. Some scows when you go after them, they have already put on hatches and caulked them down and you couldn't get at them, then the only way is to put a pike pole down the well to see if there is any water in them" (Rec. 61).

(This, it will be remembered, the master of the tug did.)

> "As to other ways to examine a scow to ascertain whether or not she had an open place in seams, was to look around on outside, but you wouldn't be apt to examine the outside of a scow unless she had a heavy list at one corner or something, then we would be apt to look to see what the trouble was (Rec. 61). Assuming there was an opening in the scow, you would be very apt to notice that if you went inside and examined the scow all through, but you would not be apt to make that close an examination, unless you knew she had water in her (Rec. 61, 62). The only way you would discover (the hole) would be by making a minute examination of the scow and there is no captain that does that who is handling the scow unless they know something has happened to the scow. (If the opening is above the water line) a man might go into the scow and not notice it. (With the scow up against the dock), it is dark, you might have a hole there big enough to stick your hand through and not see it (Rec. 62). If not dark at side of scow, opening of that size, by making ordinary investigation, by looking in the compartment, you could plainly see it, if you went down in there and went clear through the scow, which very few people do. A man would have no occasion to go into the scow (Rec. 62). Could see a hole three or four inches wide and six or seven feet long, if you look right at it. He would see it if he went down there looking for it and trying to find it" (Rec. 63).

This is the claimant's testimony as to the measure of the duty of the master of the tug in

determining whether or not his tow is in fit condition to make the voyage, where the tow is a scow.

We submit that the master of the DEFENDER discharged the full measure of his duty to the scow CLAIRE.

Furthermore, if the planks of the scow had pulled apart and caused the opening on account of age, as suggested by the boat builder Johnson, witness for claimant, (second answer on page 83 of the Record), the claimant being the charterer and owner *per hac vice* was charged with the knowledge of the condition of the scow and, if unseaworthy, cannot hold the tug or petitioner for any loss of cargo resulting therefrom particularly where such condition was not disclosed by claimant to the tug.

Johnson further testified regarding his survey of the scow on direct examination by claimant:

> "I was looking at the outside where the water might have gone into the scow, and I found that and I thought that was enough to sink the scow at the time she was out."
>
> * * * * * * * * *
>
> "(Whether opening had been caused by presence from within or without) that I could not tell. * * * The sea was so big and the oakum was so loose it would have come out very easy with the pressure of the storm" (Rec. 82).
>
> "In places where the (deck) planks, you

see there they get kind of worked down and the corners kind of broken off."

Q. Enough to take water in if awash?

A. Yes (Rec. 83).

When disaster overtakes a vessel at the beginning of the voyage without stress of weather or other adequate cause, the presumption is that she was unseaworthy when the voyage commenced.

S. S. Wellesly vs. Hooper & Co., 185 Fed. 733, C. C. A. 9th Circuit.

If a defect without any apparent cause be developed it is to be presumed it existed when the service began.

Work vs. Leathers, 97 U. S. 379.

As to what constitutes seaworthiness, it has been uniformly held that if a vessel springs a leak and founders, soon after starting upon her voyage without having encountered any storm or other peril to which the leak can be attributed, the presumption is that she was unseaworthy when she sailed.

Du Pont De Nemours vs. Vance, 19 How. 162.

VI.

Duty of the Tug Under Towage Contract.

As to the 7th Assignment of Error.

The trial court held that it was the duty of

petitioner to deliver the cargo at Port Blakely and it could not relieve itself from liability by placing the timbers in a boom at Everett and notifying the claimant of that fact.

We will admit that if the loss of the cargo was due to the negligence of the tug, any expense incurred in salving the spilled lumber would be a charge to be borne by petitioner as a consequence flowing from such negligence.

The towage contract was to tow a scow loaded with lumber—not a divisible contract to tow the scow and also to transport the lumber.

Only as the lumber constituted the cargo of the scow laden aboard the scow did the petitioner have any relation to it.

When the scow and its cargo became separated, that is when the lumber ceased to be cargo, then in the absence of any fault on the part of the tug, the petitioner had no duty respecting it as it lay impounded at Everett further than to give notice to claimant as to its whereabouts after it ceased to be cargo.

It then became claimant's duty to look after its own and failure to do so followed by subsequent loss through no fault of petitioner would be at claim-

ant's risk; petitioner would be without liability in the matter.

VII.

Damage.

As to the 6th, 7th and 9th Assignments of Error.

It was agreed between counsel that the cargo of lumber on scow at mill consisted of

	1,085 pieces	294,228 ft.	(Rec. 24, 59, 109)
delivered at Port Blakeley	185 pieces	46,022 ft.	(Rec. 59, 109)
not delivered that each piece averaged 275 ft. (Test. of Mitchell, Rec. 111)	900 pieces	248,206 ft.	(Rec. 109)
totally lost	34 pieces	9,350 ft.	(Rec. 59)
salved and impounded in boom at Everett	866 pieces	238,856 ft.	

Mitchell, manager for claimant, testified that he saw at Everett, in the boom, from 120 to 200 pieces (Rec. 114), that the corners of the sticks were rounded and badly chafed, rock-chafed (Rec. 113); total loss to claimant (Rec. 113); that the market value on Puget Sound was same as export value (Rec. 112); had market value after reconditioning (Rec. 113); would cost as much to recondition as original cost (Rec. 113).

Hayley, supervisor for Pacific Lumber Inspection Bureau, witness for petitioner, testified that he inspected the timber at Everett (Rec. 138).

It was stipulated that the lumber inspected by Hayley was the timbers lost off the CLAIRE (Rec. 146).

Hayley testified as to their condition, that they were a little worn, needed a little trimming, only three sticks in all damaged (Rec. 139); rest of timber in pretty good condition (Rec. 140); one man in one day could have retrimmed the damaged sticks with a cross cut saw, (as they lay in the water) (Rec. 140, 141); that he would have passed the timbers and issued usual certificate of inspection for export trade after such retrimming, if in loading they turned out to be what they appeared to be (Rec. 139).

There had been urgent need on part of claimant for delivery of the lumber at the time it was shipped in December, 1918, for the reason that the ship which was to carry it foreign was at Port Blakely on demurrage (Mitchell, for claimant, Rec. 119).

In January or February, 1919, after completion of the salving operation, no doubt after the ship had been loaded and sailed, the claimant was not in such urgent need of that cargo that was salved, which he was advised by petitioner was then impounded at Everett.

We submit that the unimpeached testimony of Hayley, a disinterested witness, outweighs the testimony of Mitchell, an interested witness; and that the claimant has not sustained the burden of proof on the question of damage.

Assuming for the sake of the argument that the spilling of the scow's cargo was due to the tug's negligence, it was the duty of claimant upon being advised the spilled lumber was impounded at Everett, to minimize the loss it sustained by reconditioning the timbers if their value after such reconditioning would warrant such expense.

We submit that the evidence shows that the expense of reconditioning was nominal and the recovery by claimant, if any, should be limited to what the evidence shows would have been the cost of reconditioning to which should be added the difference between the market value of the lumber delivered by the Canyon Lumber Company at its mill and its market value when reconditioned, if the latter value was the less. Or to put it another way, the original market value less proceeds of salvage after paying cost of reconditioning.

VIII.

The Decree.

As to the 10th and 11th Assignments of Error.

We submit that the claimant has failed to make out its case against the petitioner on any point. It has not sustained the burden of proof: (1) that the scow hit the bank; (2) if the scow hit this bank, that such impact caused any damage or caused the scow to leak; (3) that the turbulent waters of Puget Sound caused any damage; (4) that those in charge of the tug were guilty of any negligence; that it sustained the damage complained of.

The decree should therefore be reversed and a decree directed to be entered adjudging petitioner and its tug not liable at all for the damages and for costs.

Respectfully submitted,

WILLIAM H. GORHAM,
Proctor for Petitioner-Appellant.

No. 3798

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

In the Matter of the Petition of the PACIFIC TOW BOAT COMPANY, a corporation, owner of the American Tug DEFENDER, for a limitation of Liability.

PACIFIC TOW BOAT COMPANY,
a corporation,

Petitioner-Appellant,

vs.

DOMINION MILL COMPANY,
a corporation,

Claimant-Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Brief of Claimant-Appellee

JOHN E. RYAN,
GROVER E. DESMOND,
Proctors for Claimant-Appellee.

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Brief of Claimant-Appellee

STATEMENT OF THE CASE

The summary of the pleadings as set forth in the Appellant's Brief presents the issues for determination on this appeal. The Appellee, however, believes it desirable and material that the Lower

Court's decision on the merits be set forth, which is as follows:

"*Neterer*, District Judge:

The issue here is a question of fact. It is conceded that liability may be limited if negligence is shown, and in that event the decree shall not exceed the sum of $2,700.00, the appraised value of the tug. The facts to be found are the seaworthy condition of the scow, the negligence of the claimant, if any, and the amount of damage, if any, to be decreed. From the testimony it must be concluded that the scow at the time it was taken by the petitioner was seaworthy. It was very recently placed in 'good condition.' It was inspected by Wilson, the repairman for claimant. A few days before the casualty it was towed from Everett to Anacortes, and found in good condition. It was examined by the master of petitioner at the time it was taken and found that it had not water enough to siphon. It also appears that it was properly loaded. This was the status when the petitioner took the scow. It was taken into the open waters of the Sound and approximately 250,000 feet of lumber was lost. Something less than 50,000 feet was delivered. The petitioner asserts that it was free from negligence and that the fault was with the scow, because of age, decay, etc., she was unseaworthy. The only testimony of negligence is that the scow went onto the bank in the river, and also some testimony that the condition of the weather was such by reason of strong wind that a careful master would not venture out. There is also testimony as to the condition of the scow after she reached the mill. A long crack near her top seam in one corner; and one of the timbers in the gunnel was split. There is no continuity of evidence

as to the scow from the time of delivery until the survey about ten days later, during which time she was on the beach. It is impossible to harmonize all the evidence. The court from the evidence must find that the scow collided with the bank of the river. Two disinterested witnesses so swear. The extent of the damage, if any, no one who testified saw. The master swears he examined the scow at Priest Point after the time of collision charged before entering the open waters of the Sound, and found her to be all right. Entering the open waters of the Sound the lumber was lost. It must be concluded in view of the testimony that either the running onto the bank or the turbulent condition of the water occasioned the loss, and in either event the petitioner was at fault and should respond, and under Sections 4283 and 4284, Rev. Stat., the liability may be limited to the value of the tug. It is earnestly contended by the petitioner that even though the tug was negligent, that practically all of the lumber was salved and placed in a boom at Everett and testimony is produced that one man with a crosscut saw could in one day trim all of the damaged timber, so there would be no loss. The testimony, I think, shows that the damage by reason of the rounding of the edges of the square timber could not be compensated in the manner indicated. Again it was the duty of the petitioner to deliver the cargo at Blakely Island, and it could not relieve itself from liability by placing the timbers in a boom at Everett and notifying the claimant of such fact. The damage to the claimant is more than twice as much as the appraised value of the tug, and it appears from the testimony that the cost to recondition the lumber, and difference in value, it being a special order, and place it either at the point of shipment or destination would be as much at least as the

value of the tug, and for this expense the claimant could recover in any event.

A decree may accordingly be presented.

JEREMIAH NETERER,
District Judge."

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POINTS OF LAW AND FACT

I AND II.

Did the Scow Strike the Bank of the River and, if so, Did Such Impact Cause it to Leak? (First, Second and Third Assignments of Error.)

In cases of towage service of this character, where no representative of the claimant accompanies the tow, it is of necessity difficult to produce direct and chronological testimony of the mode and method of handling the scow by the Appellant. However, we confidently believe that the direct testimony, with the attendant circumstances and physical facts, establish such negligence. It becomes material to inquire and observe the physical condition of the scow CLAIRE prior to, at the conclusion and subsequent to the completion of the towage service.

The Lower Court found that the scow, at the time it was taken by the Appellant was seaworthy. The evidence abundantly supports such conclusion. *Stafford Wilson*, a witness on behalf of the Appellee, who did the construction and repair work at the plant of the Canyon Lumber Company, the consignor of the timber, testified that in June or

July preceding December, 1918, the scow was completely overhauled, at which time all the guard rails were taken off, she was re-caulked, the caulks cemented, painted and placed a new deck on top of the old deck; and from the time of such repairs she was kept in practically continuous service, and it was his duty to inspect and examine her (Rec. p. 28). That on the morning of the 11th of December, after she was loaded with her cargo of lumber, he again examined her. At that time he put on a new hatch and there was nothing wrong with the scow that he could see. He looked in the gunnels and she had no water. At that time he gave the scow a general examination, examined all the hatches and she was all right (Rec. pp. 29-30). All the hatches were properly caulked (Rec. p. 37), and he then fastened them down with four twenty-penny spikes and bent them over (Rec. p. 78).

W. C. Niemeyer, one of the claimant's witnesses, testified that he was Lumber Inspector and loaded the scow in question. That, before loading, he examined her and saw that she was seaworthy. The hatches were all on and caulked (Rec. pp. 49-50). In June or July she was overhauled and the deck re-caulked and a false deck put on top to protect the other deck and, after such overhauling, she was absolutely seaworthy. She did not leak and thereafter was continually used for towing lumber (Rec. p. 51).

Oliver D. Hancher, a tow boat captain, testified that he had towed the scow some three or four

weeks previous to the accident in question and had towed her many times to Blakely (Rec. p. 60). That, as far as being seaworthy, the scow was in good condition to take a load at any time and he had never had any trouble with her (Rec. p. 63).

Captain W. F. Oldenburg testified that he towed her from Everett to Anacortes approximately ten days prior to the date in question and found her in good condition (Rec. p. 80).

Captain Jeffries, the Master of the petitioner's tug DEFENDER, admitted that, when he tied on to her, she looked in good condition all around, and that there was not enough water in her to siphon (Rec. p. 90). And she appeared to be well loaded and stowed (Rec. p. 91).

Likewise, witnesses *Wilson* (Rec. p. 33) and *Niemeyer* (Rec. p. 37) testified as to the manner of loading and that the cargo was well loaded.

There is no testimony to the contrary, and it is, therefore, conclusively apparent, that the scow was seaworthy and properly loaded immediately prior to the appellant assuming her custody and control.

It is likewise material to determine her condition at Port Blakely after she had sprung the leak and had dumped the greater portion of her load.

John S. Clark, a lumber inspector, for the Appellee, at its mill in Port Blakely, testified that he examined the scow when they were drawing the

water out of her on the beach at Port Blakely. That a light was put down through the hatch and you could see the light through the crack; that it was several feet long; that, while he did not measure it, he pushed his ruler through it (Rec. p. 25), and that this crack ran lengthwise of the scow (Rec. p. 27).

Captain J. C. Johnson examined the scow at Port Blakely and found that some of the seams were opened at least three-quarters of an inch, a guard was torn off from the end and the oakum was out three feet long on the side of the scow. He did not examine the interior of the scow (Rec. pp. 81-82).

It is also material to consider her condition upon her return to the Canyon Mill. *Mr. Wilson* testified that, upon her return, one end of her was cracked in, that the crack extended back about ten feet from the corner and about fifteen or eighteen inches below the deck; that one of the gunnel timbers had a new split thirty or forty feet long (Rec. p. 38). In his opinion, such damage was caused by her being heavily jammed into something and he did not believe that such would be caused by the wash of the sea (Rec. p. 41).

Mr. Niemeyer testified that he examined the scow upon her return and he found that the header on the end side was lifted up for a distance of ten or twelve feet. He also observed that one of the bulkheads was lifted up and that one of the gunnels running through the inside of the scow was split or

lifted up for twenty or thirty feet (Rec. p. 52). That he believed the header was not raised and split by the wash of the sea, but that she had come in contact with some solid substance (Rec. p. 52).

It, therefore, conclusively appears that, at the time the DEFENDER took the Claire in tow, she was in a seaworthy condition. It is admitted that, after the tow entered the waters of Puget Sound, she shipped water, became partly submerged and dumped the greater portion of her load. The testimony of the Appellee as to the scow's damaged condition at the conclusion of her voyage and upon her return to the Canyon Mill is undisputed. The conclusion is, therefore, irresistible that some untoward event must of necessity have occurred to cause the resultant damage and loss. Such events are not of common occurrence. They are not the general rule, but an aggravated exception. The distance from Priest Point to Port Blakely, the towing distance, was approximately twenty-eight miles—ordinarily an uneventful and short tow. Therefore, some intervening circumstance of necessity changed the voyage from its ordinary status to disaster. The conclusion must be that either the scow was unseaworthy and the resultant loss was due to her defective condition, or she was so negligently handled by the appellant as to cause such damage. The former contention is untenable in view of the positive testimony of her seaworthiness and Captain Jeffries' admission that she so appeared to him before he took her in tow. In fact, such complaint is

now offered for the first time and then only as an argumentative and speculative theory, the appellant's contention being that the master of the tug was not negligent and the deduction is that the scow was unseaworthy. Admittedly something occurred to alter the physical condition of the scow on this voyage. What such occurrence was is not left to speculation or vague wonder, as urged by the appellant, for there is positive and credible testimony that the scow ran against the bank of the river shortly after she left the mill and about one quarter of a mile therefrom. The Court, in its opinion, stated:

> "The court from the evidence must find that the scow collided with the bank of the river. Two disinterested witnesses so swear."

This conclusion of the Court is abundantly supported by the evidence. *Mr. Wilson* testified that, after he had made the repairs on the scow and started toward the mill, his attention was directed to the fact that the scow was on the bank. He stopped and looked and saw the scow against the bank. At that time she was moving, but he did not know whether she was moving with the current or the tug, as it seemed to be mixed up in some way. That he looked at it for a few minutes and then went about his work (Rec. pp. 30-31). That she struck the right-hand bank of the river as she was going downstream; that he only watched it three or four minutes and they were maneuvering about at the time. She was against the bank and not

approaching it when he saw her (Rec. p. 37). The place where she went against the bank was about a quarter of a mile from the mill (Rec. p. 36).

Percy Ames, a witness on behalf of the claimant, testified that he saw the scow against the bank about a quarter of a mile from the mill. That he saw her go against the bank and the tug stopped and swung with the current when she hit. It was practically broadside to the river when she touched the bank. He then got around and did not stop any more than to square himself in the river and go again (Rec. p. 43).

Captain Jeffries testified that he was maneuvering about in the river and that, when you are alongside of the scow and shove ahead there is a tendency to shove sideways to a certain extent and that the load on the tail end of the scow rubbed the trees that overhung the bank of the river (Rec. p. 89). He likewise stated that, as he started down the river, the lines from the scow to the tug got slack and, while he was maneuvering to tighten the same, that the scow made an angle of about forty-five degrees across the river (Rec. p. 88). The natural inference is that it was these maneuvers that witnesses *Wilson* and *Ames* testified about, and that the tow was, though even for an instant, out of the control of the tug.

Garner, the deckhand on the tug, and the only other witness testifying for the appellant on this point, admitted the same facts (Rec. p. 131).

Captain Hancher, an experienced tow boat man, who is familiar with the river at this location, stated that the resultant damage to a scow running into the bank of a river in this location would depend upon how it struck. On one occasion it might strike the mud with no damage but that, if it struck a root or stump, slight contact would be all that would be necessary to put a hole in it, and in this particular location the bank was full of stumps, roots and things (Rec. p. 65). That whether or not such a contact against a stump would break the plank or open a seam depended upon the manner in which the scow came into contact. Such contact against a stump would have a tendency to open the seams. That you might run into a bank a dozen different times and at each time have a different effect upon your scow; that it all depended upon what the scow would go up against (Rec. pp. 68-69).

The Court was justified in holding that the witnesses for the claimant on these facts were disinterested for they were in no wise connected with the claimant, owed claimant no responsibility or duty and were absolutely disinterested, while the witnesses to the contrary, the master and deckhand of the tug, were no doubt prompted in their testimony by their fidelity to their employer, coupled with a natural desire to free themselves from blame and negligence. And in its final analysis, the issue presented is one of fact dependent entirely upon the credibility of the witnesses.

We respectfully submit that the testimony of the disinterested witnesses that she went against the bank is the true version of the event and that the contention of the tug's crew that it was only her load that brushed the overhanging trees is but a futile effort to obscure the real facts explanatory of its close proximity to the bank. The petitioner, however, offers no excuse whatsoever for the tow being in close proximity to the bank. The river at the point in question was abundantly wide for the tow in question. The witness *Garner* testified that, when they finished tightening their lines, they were approximately in mid-channel (Rec. p. 131). No satisfactory explanation is offered for immediately thereafter crowding the bank of the river. Surely careful navigation would not permit such a hazard and leave no room for difference of opinion as to whether the scow was against the bank or merely her load touching the trees.

Since the evidence is that the scow struck the bank, the conclusion is irresistible that such impact so loosened her seams and damaged her that, when she went out into the open waters of Puget Sound, the choppy seas completed the damage initiated by such contact. No other conclusion can be logically followed, for, according to the contention of the appellant, the maximum wind was but eighteen miles per hour. Captain Jeffries insisted that it was not an unusual or dangerous sea. The positive testimony is that such a sea would not have caused the result and damage if she was seaworthy. The

undisputed evidence is that she was seaworthy. If it were not the collision, what caused the injury to her? Appellant speculates that she was rotten and decayed and not properly loaded, resulting in her taking water and thereby shifting her cargo. Such theory is fallacious for the reason that it is opposed to the positive testimony of the claimant, and the petitioner has offered no evidence to the contrary.

The appellant urges that, since the tow was headed down-stream, if she struck the bank, it was of necessity with her bow, and, therefore, the injury to what they insist is the stern was not attributable to any such contact. Such contention is inconclusive, for again the appellant is attempting to oppose the positive facts with vague theory and surmisal.

It will be remembered that Percy Ames testified that, when he saw the scow against the bank, she was practically broadside to the river and that "he (the Captain) then got around and did not stop any more than to square himself with the river and go again." (Rec. p. 43.) Captain Jeffries testified that, when alongside of the scow, it was attempted to shove ahead, there is a tendency to shove sidewise and that the load on the tail end of the scow rubbed the trees that overhung the bank of the river (Rec. p. 89). Garner, the deckhand, testified to the same effect (Rec. p. 131). While both ends of the scow were identical in construction, if it be assumed that the rear end going downstream

is the stern, then it is conclusive that it was the rear end or stern that struck the bank. The physical facts support such contention and Captain Jeffries and Garner, in attempting to explain away the positive testimony of the disinterested witnesses as an optical illusion, state that it was the load on the stern that brushed the trees. It is apparent, therefore, that it was the stern that was nearest the bank and a physical necessity that it was that part of the scow that struck.

Appellant advances as an applicable proposition of law the rule that the burden to establish negligence is upon the claimant and that negligence is never presumed nor can the cause of an injury be left to speculation and conjecture. Such is the general rule. The exception is found in those cases in which the happening of an accident and the result is so unusual and extraordinary as to constitute evidence of negligence and shift the burden of proof.

In *The Steamer Webb*, 81 U. S. 406, 20 L. Ed. 774, cited by appellant, such principle is recognized in the following language:

> "The contract requires no more than he who undertakes a tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it. Had the ship in this case been towed upon a shoal ten miles north or ten miles east of Handkerchief Shoal, after leaving that shoal for Cross Rip, it cannot be doubted that the

> fact of the stranding at such a place, would, in the absence of explanation, be almost conclusive evidence of unskillfulness or carelessness in the navigation of the tug. The place where the injury occurred would be considered in connection with the injury itself, and together, they would very satisfactorily show a breach of the contract, if no excuse were given. At least they would be sufficient to cast upon the claimants of the tug the burden of establishing some excuse for the deviation from the usual and proper course."
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> . . . . . .
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> "We do not say that in order to excuse, it must be shown that the accident was inevitable, but it ought to appear that so remarkable a deviation from her correct course, made so soon after leaving Handkerchief Light, was consistent with cautious and skillful management."

In the *Propeller Burlington*, 137 U. S. 383, 34 L. Ed. 731 (cited by appellant), it appeared that the Propeller took her tow along one route instead of the usual, safe and proper course at that season of the year, especially with the wind that was prevailing and, after having once gained shelter that offered a sufficient protection, left it and pulled the tow into the open lake where it was subject to the full force of the wind. The Court said:

> "These findings established that in what was done, there was an actual lack of the usual caution and skill, and that what was omitted to be done was within the power of the Propeller to do, and should have been done by any master of competent skill and experience; and that different conduct would, in all probability, have prevented the catastrophe. As we cannot

go behind the findings and they are sufficient to sustain the decree, further argument is not required. *The Maggie J. Smith*, 123 U. S. 349 (31:175); *The Gazelle*, 128 U. S. 474 (32: 496)."

The *J. P. Donaldson*, 167 U. S. 599, 42 L. Ed. 294, relied upon by appellant, was a case in which the law of general average was involved. The Court said:

> "The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services."

In the instant case, such skill was not employed. The Appellant offers no explanation, excuse or good reason why the scow was permitted to come in contact with the bank of the river where there was an abundance of room in which to navigate, and such fact is in itself negligence.

Other cases in which the law and facts are applicable to the instant case, are the following:

Burr vs. Knickerbocker Steam Towage Co., (C. C. A.), 132 Fed. 248, in which the Court said:

> "Under such circumstances, the fact that the schooner went aground casts upon the tug the burden of establishing some excuse for the deviation from the usual and proper course.

The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774, is cited to the proposition that no presumption of negligence arises from the mere fact of damage to a tow. In that case, however, the Court said (page 414, 14 Wall. 20 L. Ed. 774):

'But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it. Had the ship in this case been towed upon a shoal ten miles north or ten miles east of Handkerchief Shoal, after leaving that shoal for Cross Rip, it cannot be doubted that the fact of the stranding at such a place, would, in the absence of explanation, be almost conclusive evidence of unskillfulness or carelessness in the navigation of the tug. The place where the injury occurred would be considered in connection with the injury itself, and together, they would very satisfactorily show a breach of the contract, if no excuse were given. At least they would be sufficient to cast upon the claimants of the tug the burden of establishing some excuse for the deviation from the usual and proper course.'

In *Inland & Seaboard Coasting Co. vs. Tolson*, 139 U. S. 551, 554, 555, 11 Sup. Ct. 653, 35 L. Ed. 270, it was said:

'The whole effect of the instruction in question, as applied to the case before the jury, was that if the steamboat, on a calm day, and in smooth water, was thrown with such force against a wharf properly built as to tear up some of the planks of the flooring, this would be prima facie evidence of negligence on the part of the defendant's agents in making the landing; unless upon the whole evidence in the case this prima facie evidence was rebutted. As such damage to a wharf is not ordinarily done by a steamboat under the control of her officers and carefully managed by them, evidence that such damage was done in this case was prima facie,

and, if unexplained, sufficient evidence of negligence on their part, and the jury might properly be so instructed. *Stokes vs. Saltonstall*, 13 Pet. 181, 10 L. Ed. 115; *Transportation Co. vs. Downer*, 11 Wall. 129, 134, 20 L. Ed. 160; *Railroad Co. vs. Pollard*, 22 Wall. 341, 22 L. Ed. 877; *Le Barron vs. East Boston Ferry*, 11 Allen 312, 317, 87 Am. Dec. 717; *Feital vs. Middlesex Railroad*, 109 Mass. 398, 12 Am. Rep. 720; *Rose vs. Stephens & Condit Co.* (C. C.), 11 Fed. 438.'

In order to prove negligence it is not invariably necessary that the libelant shall show the specific details of negligence, or account for the exact manner in which the injury is inflicted. When the libelant proved that the moving of the vessel was in sole charge of the tug, that the schooner's wheel was hard aport, and that on a summer afternoon, with a light breeze and moderate tide, and with nothing to prevent the tug from having such full control of the schooner as would keep her in deep water, she was so towed that she came up on the westerly shore, or upon a well-known rock, before she had gone more than three or four lengths, a prima facie case of negligence was established.

The learned District Judge, though finding that the accident was not properly accounted for, declined to hold the tug responsible in damages. We are of the opinion that this was error, and that, under the rule of the cases cited, the burden of explanation was cast upon the tug to account for this apparently unnecessary grounding. The tug proved no fault in the management of the schooner and gave no reasonable explanation why she did not keep the schooner under control. On this showing alone, the libelant was entitled to a decree for damages."

In the *W. G. Mason* (C. C. A.), 142 Fed. 913, the steamer was stranded while being towed by two tugs. The Court said:

> "It suffices that the misfortune occurred without any fault on the part of the tow, or on the part of the Babcock, and under a state of circumstances in which, *if proper care is exercised in performing a similar service, such misfortune does not ordinarily occur.* This was enough to impose upon the tugs the burden of proof to show that they did exercise due care. *Rose vs. Stephens & Condit Co.*, 20 Blatchf. 411, 11 Fed. 438; *Inland & Seaboard Coasting Co. vs. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270. This Court has had frequent occasion to apply this doctrine in similar cases; the latest being the case of *The Genessee* (C. C. A.), 138 Fed. 549.
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> The proof offered by the tugs did not afford any explanation of the causes of the disaster aside from the alleged disregard of orders by the tow. No unforeseen difficulties were encountered and no obstacle which the tugs were not bound to anticipate. The case is one where the stranding of the steamer created a presumption of negligence. *The Webb*, 14 Wall. 406, 20 L. Ed. 774; *The Kalikaska*, 107 Fed. 959, 47 C. C. A. 100."

The District Court, passing on the last mentioned case, 131 Fed. 636, wrote:

> "Under the facts of the case, the burden is upon the libelees to satisfactorily excuse their wrongful omission to exercise the degree of care demanded by the situation. *A specific act of negligence need not be shown by libelant.* The rule which requires affirmative proof of negligence against a tug by her tow is conspicuously distinct from the rule which is applied to a common carrier, who, when proceeded

against on contract, is presumptively in fault. Not so, however, *where the result indicates* negligence on the part of the tug having charge and control of her tow. It is perfectly true that the adjudications uniformly hold that an engagement to tow imposes neither the obligation to insure nor the liability of a common carrier, and accordingly negligence must be proven by the libelant. *The Margaret*, 94 U. S. 494, 24 L. Ed. 146; *The Lady Wimett* (D. C.), 92 Fed. 400; *The A. R. Robinson* (D. C.), 57 Fed. 667; *In re Thomas Wilson* (D. C.), 124 Fed. 653; *The J. P. Donaldson*, 167 U. S. 603, 17 Sup. Co. 951, 42 L. Ed. 292. The burden is always upon him who alleges the breach of the towing contract to show either that there has been no attempt at performance, or that there has been negligence or unskillfulness, to his injury, in the performance. But the above cases do not strictly apply here. There are exceptions to this rule.

In the *Steamer Webb*, 14 Wall. 406, 20 L. Ed. 774, the exception is stated in the following language, quoted from the opinion:

> 'Unlike the case of common carriers, damage sustained by the tow does not ordinarily raise a presumption that the tug has been at fault. The contract requires no more than that he who undertakes to tow shall carry out his undertaking with that degree of caution and skill which prudent navigators usually employ in similar services. But there may be cases in which the result is a safe criterion by which to judge of the character of the act which has caused it.'

In the *Allen McGovern* (D. C.), 27 Fed. 868, the rule is succinctly stated in the headnote in these words:

> 'Where one of a large number of boats in a tow is injured by striking some obstruction on a trip over a common and safe route, the burden is upon the tug to give some rational explanation of the injury, or a consistent account of the trip, that may satisfy the Court that there was no lack of due care in navigation.' "

In *The Genessee* (C. C. A.), 138 Fed. 549, the Court said, at page 550:

> "The case is a proper one for the application of the rule that presumption of negligence arises against a bailee for hire when it appears that the subject of the bailment has been injured or destroyed while within his custody by an accident such as in the ordinary course of things does not happen when a bailee uses due care."

In *The Seven Sons* (D. C.), 29 Fed. 543, the Court said (p. 554):

> "The owners of a tow boat, it is true, are not common carriers, and they are responsible only for ordinary care, skill, and diligence. But a bailee subject to that degree of responsibility only is yet bound to show how the goods intrusted to him were lost or damaged, before he can throw upon the bailor the burden of proof of negligence. *Clark vs. Spence*, 10 Watts, 335; *Beckman vs. Shouse*, 5 Rawle, 179; *Logan vs. Mathews*, 6 Pa. St. 417. Now, here, the owners of the tow-boat were bailees for hire of the flatboat. Again, it has been held that, under a bill of lading excepting 'the dangers of the river,' it is not enough for the carrier to show that his steamboat ran upon a stone and knocked a hole in her bottom, but he must also prove that due diligence and proper skill were used to avoid the disaster, and

that it was unavoidable; and this, because the facts are peculiarly within the knowledge of himself and his agents. *Whiteside vs. Russell*, 8 Watts & S. 44. In the absence, then, of all testimony as to the manner in which the libelant's flatboat was injured, or acquitting the towboat of blame, negligence is justly to be presumed. *Humphreys vs. Reed*, 6 Whart. 444."

In the *Florence* (D. C.), 88 Fed. 302, it was said (pp. 303-304):

"The evidence is overwhelming that the Whitney was in a seaworthy condition at the time she was taken in tow by the Florence. The respondents offered some evidence of admissions by the Whitney's master that, on her journey from Buffalo, she struck upon sharp rocks at a point where blasting was going on and received injuries which caused her to leak. This is denied by the master and every member of the crew testified that nothing of the kind occurred. Admissions are most unsatisfactory proof of facts and should not be accepted against positive proof to the contrary. Assuming, then, that when taken in tow the Whitney was in ordinary condition of canal boats of her class, the inference is plain that something must have occurred on the way down the river to cause the sudden and dangerous leaking. She was then wholly in charge of the tug."

The Allen McGovern (D. C.), 27 Fed. 868;
The Ashbourne (D. C.), 206 Fed. 861;
The C. W. Mills (D .C.), 241 Fed. 241;
Great Lakes Towing Co. vs. Shenango S. S. & T. Co. (C. C. A.), 238 Fed. 480;
The Delaware (C. C. A.), 20 Fed. 797;
The Neponset (D. C.), 251 Fed. 752.

III. AND IV.

Was the Loss Due to the Turbulent Condition of the Waters of the Sound and Was the Tug Negligent in the Performance of the Towage Service?

(Fourth and Fifth Assignments of Error.)

If the Appellant's contention on these issues is correct, how can the mishap that befell the scow be accounted for, since it was in a seaworthy condition at the time, unless the contact with the bank cracked its end and opened its seam? The more stronger its contention on these issues, the more conclusive evidence of its negligence on the preceding issues.

From a reading of Captain Jeffries' testimony it is apparent that, if he examined the scow at all, it was merely perfunctory. He simply walked around her and did not make any examination of her interior. Captain Hancher testified: "Well, anybody that tows a scow and wants to use any precaution at all, ought to examine the scow if she has got a load; take up a hatch and go down inside and see if there is any water in her, so you would know that your scow was in proper condition to go out and make a trip." (Rec. p. 61). Notwithstanding Captain Jeffries' denial, he must have known that the scow was against the bank of the river. This was sufficient to require cautious inquiry and survey to determine if damage had resulted to the scow. He arrived at Priest Point at 1 p. m. and laid to until 11 p. m. on account of the

turbulent condition of the water (Rec. p. 88). It is, therefore apparent that he had misgivings up to that time at least as to the safety of the scow in the sea that prevailed, and we submit that the ordinary, careful and prudent master, under the attendant circumstances, would have made the examination that Captain Hancher said the custom was. It is conclusive in our mind that the contact with the bank so raised the header and so opened the seams as to make the scow easy prey to the sea that prevailed on that evening.

The Sound was not as mild as Appellant contends. Captain Hancher testified, if he had been in charge of the Tug Defender, he would have hunted shelter; that he would not have attempted to tow under the existing conditions, but would have tied up at Muckilteo. That, in his opinion, it was not safe to tow that night with a loaded scow (Rec. pp. 72-74), and it will be remembered that he was in the same waters that evening.

We, therefore, submit that it was not merely an error of judgment on Captain Jeffries' part, but a flagrant example of lack of skill and discretion. He did not exercise the judgment that the ordinary prudent and careful Master would under similar circumstances, and that is the test and measure of the law.

Not only was the Captain negligent in the particular of venturing forth, but it appears that he had proceeded eighteen miles before he noticed that

she had dumped her load, and had swamped,—his attention being attracted to the fact that the tow had lost its lights. The evidence was that lumber was scattered all over the Sound and discloses that a great portion of the load had been dumped prior to the time her light went out. He did not watch or pay any attention whatsoever to his tow from the time he ventured forth in the turbulent waters. It is reasonable to suppose from the evidence that she had been shipping water for some time prior to his observation that she was in trouble. The testimony is, and it is a matter of common knowledge, that, as soon as a scow commences to take water, she will list. Garner, the deckhand, testified, that the Captain could have seen the scow if he stood in the doorway and looked back (Rec. p. 133). It is, therefore, self-evident that, if Captain Jeffries had exercised but the slightest care and paid but casual attention to the scow, he would have observed her condition prior to the loss of her load, or at least the greater portion thereof; and, under the law, it was his duty to observe and watch his tow.

The Alleghany, (C. C. A.), 252 Fed. 6;
Gilchrist Transportation Co. vs. Great Lakes Towing Co. (D. C.), 237 Fed. 432;
Mylroi vs. British Mills Co., (C. C. A.), 268 Fed. 449.

V.

Seaworthiness of the Scow

(First Assignment of Error.)

We have heretofore discussed this issue and

him to contend, if petitioner's statement is true that there were 866 sticks impounded, that but eight or nine would be damaged.

The value of the timber at the time was $27 or $28 per thousand, or more than twice the appraised value of the tug, and, as the Lower Court found, the cost of the remanufacture of the lumber and to place it at the point of destination would be at least the amount of the appraised value of the Tug.

We respectfully submit that the Decree of the Lower Court is supported by both the law and the facts and should be affirmed.

JOHN E. RYAN,
GROVER E. DESMOND,
Proctors for Appellee.

No. 3802

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

BOISE-PAYETTE LUMBER COMPANY,
a Corporation,

Appellant,

vs.

HALLORAN-JUDGE TRUST COMPANY,
a Corporation, as Trustee,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

CAPITAL NEWS PUBLISHING CO., BOISE.

IN THE

United States Circuit Court of Appeals
For the Ninth Circuit

BOISE-PAYETTE LUMBER COMPANY,
a Corporation,

Appellant,

vs.

HALLORAN-JUDGE TRUST COMPANY,
a Corporation, as Trustee,

Appellee.

Transcript of the Record

Upon Appeal from the United States District Court for the District of Idaho, Eastern Division.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD:

J. H. PETERSON,
T. C. COFFIN,
Pocatello, Idaho.
Attorneys for Appellant.

EDWIN SNOW,
Boise, Idaho.
Attorney for Appellee.

INDEX

In the District Court of the United States for the District of Idaho, Eastern Division.

HALLORAN-JUDGE TRUST COMPANY, a Corporation, as Trustee,

Plaintiff,

vs.

PINGREE LAND COMPANY, a Corporation; MATKINS OPERATING COMPANY, a Corporation; BOISE-PAYETTE LUMBER COMPANY, a Corporation; C. M. BLOCKER; S. E. WILKIE; ROLAND D. WILKIE; FRED A. WILKIE and E. P. JENSEN,

Defendants.

No. 303.

AGREED STATEMENT UNDER EQUITY RULE NO. 77.

WHEREAS, The Boise-Payette Lumber Company, a corporation, one of the defendants above named, has been allowed an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California, and the parties hereto are desirous of presenting an agreed statement pursuant to Equity Rule No. 77.

NOW THEREFORE, It is agreed by and between the parties hereto

1. That the issue presented upon this appeal is the priority of the trust deed of the appellee, Halloran-Judge Trust Company, and the Materialman's Lien of the appellant, Boise-Payette Lumber Company.

2. That it was aptly alleged and proved at the trial of this cause that the mortgage or deed of trust of the appellee, the Halloran-Judge Trust Company, which covered among other property the Southwest Quarter of the Southwest Quarter of Section 14, the Northwest Quarter of the Northwest Quarter of Section 23, the Northeast Quarter of the Northeast Quarter of Section 22, and the Southeast Quarter of the Southeast Quarter of Section 15, all in Township Six (6) North, Range Thirty-four (34) East, Boise Meridian, in Idaho, was made, executed and delivered by the Pingree Land Company to the said Halloran-Judge Trust Company, on the 31st day of December, 1919, and was thereafter recorded in the office of the County Recorder of Jefferson County, Idaho, in which county all the land included within the Trust Deed is situated, on the 26th day of January, 1920, and that said Trust Deed is a first and prior lien upon all the land in this agreed statement described, subject only to the decision of the Court as to whether or not the claim of the Boise-Payette Lumber Company, the appellant, is superior thereto;

3. That it was aptly alleged and proved at the trial of this cause that the claim of lien of the ap-

pellant, Boise-Payette Lumber Company, was in all respects under the laws of Idaho at the time of the trial of this cause, a valid andsubsisting lien against the property in Paragraph 2 hereof described, all of which are required for the convenient use and occupation of the building for which materials were furnished by the Boise-Payette Lumber Company, the appellant, and all of which are subject to its lien; that on the 30th day of December, 1919, the predecessor in interest of the Pingree Land Company, a corporation, the grantor in the mortgage or deed of trust of the appellee herein, viz: the Owsley Carey Land & Irrigation Company entered into a contract with Fred A. Wilkie, as original contractor for the completion of the irrigation system of the said Owsley Carey Land & Irrigation Company, which included the erection of a pump house upon the land in Paragraph 2 hereof described; that on the first day of April, 1920, he made a sub-contract with the Boise-Payette Lumber Company for the furnishing of material for the building of the said pump house upon the land above described; that under and by virtue of the said sub-contract with Fred A. Wilkie last above described, the appellant, the Boise-Payette Lumber Company, began furnishing material on April 1st, 1920, and continued thereafter to furnish material until June 24th, 1920, at which time there was due it under the said sub-contract, the sum of $1311.84, which with payments made and

proper charges for cost of preparation and filing of lien, interest and attorney fees allowed in the above entitled Court, amounted on September 14th, 1921, to the sum of $1348.17, no part of which has been paid; that the claim of lien was filed in the proper public office within the time required by the laws of the State of Idaho, and action for the foreclosure of the said lien was instituted within the time required by the laws of the State of Idaho, and the said lien was on September 14th, 1921,a valid and subsisting lien in all respects.

4. That in the trial of this cause the appellee and plaintiff, Halloran-Judge Trust Company, prayed for a foreclosure of the mortgage or deed of trust held by it, and the appellant and defendant, Boise-Payette Lumber Company, by cross-complaint prayed for the foreclosure of its lien set forth herein, and that all necessary and proper parties for the relief prayed for by both the parties hereto were present in the Court which tried this cause.

5. That each party to this appeal, viz: the Halloran-Judge Trust Company, a corporation, as trustee, and the Boise-Payette Lumber Company, a corporation, concedes in all respects the validity of the other parties' claim, but questions only the priority claimed by the adverse party, the Halloran-Judge Trust Company asserting the priority of the mortgage or the deed of trust for the reason that it was executed and delivered and recorded prior to the time when the Boise-Paytte Lumber Company, the

appellant, began furnishing materials for the property in question, and the appellant, Boise-Payette Lumber Company asserting the priority of its claim of lien for the reason that it dates back to December 30, 1919.

The parties hereto submit the foregoing agreed statement of facts to the Court, with the inclusion of the memorandum decision and the decree, as the record on appeal in this cause, and pray the Court to approve and allow the same.

Dated this 12th day of October, 1921.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for Appellant, Boise-Payette Lumber Company.
EDWIN SNOW,
Attorney for Appellee, Halloran-Judge Trust Company.

The foregoing agreed statement of facts under the provisions of Equity Rule No. 77, is hereby approved.

Dated at Pocatello, Idaho, this 12th day of October, 1921.

FRANK S. DIETRICH,
United States District Judge.

Endorsed: Filed Oct. 13, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

MEMORANDUM DECISION.
Aug. 30, 1921.

Edwin Snow, Attorney for Plaintiff.
Peterson & Coffin, Attorneys for Defendant, Boise-Payette Lumber Company.

DIETRICH, DISTRICT JUDGE:

As trustee the plaintiff seeks foreclosure of a trust deed upon the irrigation system of a Carey Act project constructed and owned by the defendant Pingree Land Company, hereinafter called the owner. One of the defendants named is the Boise-Payette Lumber Company, and by a cross-complaint it seeks to foreclose a lien for materials furnished to one Fred A. Wilkie, a defendant, who had a contract with the owner by which he was to perform the labor and furnish the materials for the completion of the irrigation system. As between the plaintiff and this lien claimant the case is submitted upon a stipulation of facts, and the only question is which is superior, the lien of the claimant or of the trust deed.

The stipulation is to the effect that the trust deed was executed on December 31, 1919, and recorded in the proper office, on January 26, 1920. It is further stipulated that the averments of the claimant's cross-complaint are true, and from this pleading it appears that Wilkie entered into the construction contract referred to, on December 31, 1919, and that at the request of Wilkie the claimant did, on or about the 1st day of April, 1920, begin to fur-

nish the materials for the price of which the lien is now claimed. In the claimant's brief it is assumed that the further fact is shown that Wilkie began the performance of his contract immediately after its execution, but while there is such an averment in the claimant's answer, there is no allegation to that effect in the cross-complaint, and the stipulation is only that the averments of the cross-complaint are true, not those of the answer. It may be doubted whether the fact is material, but however that may be, it is not shown when Wilkie actually commenced work under his contract.

Upon the facts stated it is thought the question is so clearly concluded by Pacific States Savings Company v. Dubois, 11 Idaho, 319, 83 Pac. 513, that extended discussion is unnecessary. This Court is bound by the construction thus placed upon the state statute, and of course, the state statute is controlling. It must therefore be held that the claiman's lien is inferior to that of the trust deed.

The claimant refers to a California decision and to the text in Bloom on Mechanics Liens, and also to the case of Continental and Commercial Trust and Savings Bank v. Corey Brothers Construction Company, (arising in this district), 208 Fed. 976. But in view of the decision of the Supreme Court of Idaho it is needless to comment upon decisions from other states; and as to the Corey Brothers case, it would seem sufficient to observe that, as appears upon the face of the decision, the question

here considered was not presented to the Circuit Court of Appeals. But I have taken the trouble to examine the record in this Court, and I find that while the trust deed in that case was dated August 27, 1909, and was recorded September 3rd of the same year, and the contract of the Portland Cement Company, one of the lien claimants, bears date and was actually executed on September 18th, and while further the contract of the Corey Brothers Construction Company was dated and actually executed on August 26th, there was an oral agreement had between the owner and Corey Brothers Construction Company as early as June, which was in substance the same as the written instrument executed on August 26th, and that thereupon Corey Brothers Construction Company commenced work, and continued both before and after the execution of the written agreement; and that at the time of the oral agreement with Corey Brothers Construction Company the owner authorized it to make arrangements for the necessary cement, and that accordingly it did enter into an agreement for the owner with the Portland Cement Company, pursuant to which this company began to furnish material before the execution of the trust deed, and actually delivered certain consignments upon the ground where it was to be used as early as September 2nd, the day before the trust deed was recorded. These facts clearly took the case out of the range of the principle announced in the Dubois case, and it was

doubtless for that reason that the point was not raised in the Circuit Court of Appeals.

Endorsed: Filed Aug. 30, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

DECREE.

This cause having, by stipulation of counsel and order based thereon, been transferred from the Eastern Division of this District to the Southern Division, came on to be heard this term at Boise, Idaho. Evidence was received, and it was argued by counsel, and thereupon, upon consideration thereof, it is ordered, adjudged and decreed as follows, to-wit:

1. That the mortgage, or deed of trust, dated the 31st day of December, 1919, made by the defendant Pingree Land Company to the complainant, and which said mortgage or deed of trust is sought to be foreclosed in this action, is a first and paramount lien, prior and superior to the lien or interest of any of the parties hereto, and secures the payment of the sums hereinafter found due upon the following described property, to-wit:

All the real and personal property of the Pingree Land Company, including water rights, ditches, canals, laterals, rights of way, easements, incomes and choses in action owned by said Pingree Land Company on the 31st day of December, 1919, or

which it has since acquired, and particularly that certain irrigation system known as the Second Owsley Irrigation Project in Jefferson County, Idaho, more particularly described as follows:

All the right, title and interest defined and granted to the Owsley Carey Land and Irrigation Company by the terms of a certain indenture in writing between the Mud Lake Canal Company, an Idaho corporation, and said Owsley Carey Land and Irrigation Company, dated July 8, 1919, whereby there was granted to said Owsley Carey Land and Irrigation Company an undivided interest in and to certain irrigation canals and a certain pump house which the parties to such indenture had theretofore constructed for use in common, said canals and pump house being more particularly described as follows:

INTAKE. That certain intake canal beginning at a point in Mud Lake, situated approximately North 39°, 42′ East 5714″ from the section corner common to Sections 10, 11, 14 and 15, Township 6 North, Range 34 East of Boise Meridian, and extending generally in a southerly direction to the pump house.

PUMP HOUSE. A certain concrete pump house situated at or near the Northeast corner of Section 22, Township 6 North, Range 34 East of Boise Meridian.

MAIN CANAL. A certain section of main canal beginning at the pump house above described

and extending south approximately three miles.

WEST BRANCH CANAL. That certain section of canal four miles in length, being the first four miles of what is known as the West Branch Canal, beginning at the Southeast corner of Section 34, Township 6 North, Range 34 East of the Boise Meridian, and extending West to the Southeast corner of Section 36, Township 6 North, Range 33 East of the Boise Meridian.

The right, title and interest in the structures above defined, so granted to the Owsley Carey Land and Irrigation Company by the terms of said indenture, being an undivided interest in and to said *intake*, said main canal and said west branch canal to the extent necessary for the conveyance and distribution of 205 cubic feet of water per second, and an interest in said *pump house* comprising the right to set, install, operate and maintain therein three electric pumping units, each consisting of pump and motors with all requisite electric and other equipment, and having an aggregate pumping capacity of approximately 205 cubic feet per second, and the right to use the said building freely without let or hindrance for the purpose of pumping the waters of Mud Lake and distributing the same to water users under said Second Owsley Project, and together also with the right to enlarge said building and to install additional pumping units therein in case it shall be desired so to do at the proper expense of the parties

so making such extension or addition, the undivided interest in said pump house and canals being subject, however, to all the obligations with respect to proportionate expense of operation and maintenance as set forth and defined in said indenture between said Mud Lake Canal Company and said Owsley Carey Land and Irrigation Company, dated July 8, 1918, and recorded in Book 54, page 214, Records of Jefferson County, Idaho.

2. The whole of that certain extension of said West Branch Canal beginning at the Southeast corner of Section 36, Township 6 North Range 33 East of Boise Meridian, and extending West about six miles.

3. All laterals, rights of way, structures, bridges, pipe lines, flumes and measuring devices owned by said Pingree Land Company and used or intended to be used in connection with said irrigation project.

4. Three certain hydro-electric pumping units, consisting of pump and motor situated at the pump house above described, together with all tools, appliances and electric or other equipment owned by said Pingree Land Company on said December 31, 1919, or since acquired by it and used or intended to be used in connection with the operation of the pumping units above described.

5. That certain water permit No. 8468 granted by the State Engineer of Idaho for the appropriation and diversion of 187.5 cubic feet per second of the waters of Mud Lake in Jefferson County, Idaho,

said permit being of record in the office of the Commissioner of Reclamation of the State of Idaho, in Book 27 of Permits at page 8468 thereof.

Also all rights, grants, interests, privileges, easements and franchises owned, acquired or possessed by said Pingree Land Company on December 31, 1919, or which it has subsequently acquired under the contract of the Owsley Carey Land and Irrigation Company with the State Board of Land Commissioners of the State of Idaho, dated February 28, 1919, and all amendments thereto, including the right and privilege to sell shares or water rights in said Second Owsley Irrigation Project evidenced by shares of stock in a corporation in said contract referred to, known as Matkins Operating Company, and all of said Pingree Land Company's right as in said contract defined to all unsold shares of stock of said Matkins Operating Company, and all of said stock now in the hands of the complainant or in the possession of the receiver heretofore appointed in this cause; and all rights acquired or owned by said Pingree Land Company on December 31, 1919, or subsequently acquired by it under that certain contract dated January 2, 1918, between the State of Idaho and the United States of America segregating the lands referred to therein and under any other contracts which since December 31, 1919, may have been executed by said Pingree Land Company and the State of Idaho relating to the irrigation of lands which may have been or

may be segregated by the United States of America for that purpose.

Also all other waters, water rights and appropriations of water owned by said Pingree Land Company on December 31, 1919, or thereafter acquired by it, and all rights of way, dikes, reservoirs, canals, ditches, laterals, headgates and flumes and the entire irrigation system of the Pingree Land Company owned by said Pingree Land Company on December 31, 1919, or which was thereafter acquired or constructed by it in Jefferson County, Idaho.

All the right, title and interest originally held by said Pingree Land Company in and to the following described contracts heretofore made by said Pingree Land Company for the sale to land owners of water rights or shares in said irrigation system and constituting to the extent of the unpaid portion of the purchase price of said water rights first liens on the land irrigated thereunder, and heretofore deposited with the complainant and assigned by the defendant Pingree Land Company to the complainant, being the contracts below enumerated, there being specified in this decree the dates, numbers, names of the several contracting purchasers, description of lands covered, and unpaid balances of principal, to-wit:

Date	No.	Entry No.	Purchaser	Description	Acres	Unpaid Principal
10- 9-19	2	110	Nick Arsen	Lots 3 & 4 Sec. 2, Tp. 5 N. R. 33 E.	80	$ 5400.00
10- 9-19	3	145	Arthur G. Croft	NW¼ SW¼ Sec. 31, Tp. 6 N. R. 34 EBM (Lot 3)	39.89	2692.57
10-10-19	4	98	Harry M. Morey	Lots 1 & 2 E½ NW¼ Sec. 31, Tp. 6 N. R. 34 EBM	159.58	.....
10- 9-19	5	106	Perry Trip	NE¼ SW¼ Sec. 31, Tp. 6 N. R. 34 EBM	40	2700.00
10- 9-19	6	107	J. S. Hall	SE¼ NE¼ Sec. 11, Tp. 5 N. R. 33 EBM	40	2700.00
10- 9-19	7	125	John A. Ryan	Lot 4, Sec. 31, Tp. 6 N. R. 34 EBM	33.30	2247.75
10- 9-19	8	99	Elmer E. Gillett	SW¼ SW¼ Sec. 34, Tp. 6 N. R. 33 EBM	33.33	2249.77
10- 9-19	9	126	Harry Pursel	SE¼ SW¼ Sec. 31, Tp. 6 N. R. 34 EBM	33.33	2249.77
10- 9-19	10	123	James Morris	Lots 1 & 2 N½ SE¼ Sec. 4, Tp. 5 N. R. 33 EBM	160	10800.00
10- 9-19	11	111	R. R. Deabenderfer	N½ SE¼ Sec. 35, Tp. 6 N. R. 33 EBM	80	5400.00
10- 9-19	13	109	Clayton L. Atwood	NW¼ SW¼ Sec. 3, Tp. 5 N. R. 33 EBM	40	2700.00
10- 9-19	14	124	Jed McFerson	SE¼ SW¼ Sec. 34, Tp. 6 N. R. 33 EBM	33.33	2249.77
10- 9-19	15	140	Ray L. Done	S½ NE¼ N½ SE¼ Sec. 12, Tp. 5 N. R. 33 EBM	160	10800.00
10- 9-19	16	103	H. J. Gregerson	SW¼ NE¼ Sec. 35, Tp. 6 N. R. 33 EBM	40	2700.00
10- 9-19	17	131	Jonathan F. Johnson	W½ NE¼ Sec. 11, Tp. 5 N. R. 33 EBM	80	5400.00
10- 9-19	18	117	W. W. Robinson	E½ NE¼ Sec. 35, Tp. 6 N. R. 33 EBM	80	5400.00
10- 9-19	21	101	Edgar Buchanan	NE¼ SE¼ Sec. 33, Tp. 6 N. R. 33 EBM	40	2700.00
10- 9-19	22	115	Albert M. Mayer	S½ SE¼ Sec. 35, Tp. 6 N. R. 33 EBM	66.66	4499.55

10- 9-19	23	116	James Bergesen	N½ SW¼ Sec. 34, Tp. 6 N. R. 33 E B M	80	5400.00
12- 5-19	24	143	John W. Brandt	NW¼ Sec. 7, Tp. 5 N. R. 33 EBM	160	10800.00
10- 9-19	26	138	Frank Pingree	SW¼ Sec. 35, Tp. 6 N. R. 33 EBM	146.66	9899.55
10- 9-19	27	100	E. J. Slater	Lot 1 Sec. 5, Tp. 5 N. R. 33 EBM	40	2700.00
10- 9-19	28	134	Donald Campbell	N½ SE¼ Sec. 30, Tp. 6 N. R. 33 EBM	80	5400.00
10- 9-19	30	118	Joe Kramer	Lots 1 and 2, Sec. 31, Tp. 6 N. R. 33 EBM	65.52	4422.60
10- 9-19	31	144	John P. Elliott	N½ SE¼ Sec. 34, Tp. 6 N. R. 33 EBM	80	5400.00
10- 9-19	32	139	Myron Swendsen	NW¼ Sec. 35, Tp. 6 N. R. 33 EBM	160	.....
10- 9-19	33	142	Anna Hershey	SE¼ SW¼ SW¼ SE¼ Sec. 7, Tp. 5 N. R. 34 EBM	80	5400.00
10- 9-19	34	127	James F. Brown	SW¼ SE¼ Sec. 34, Tp. 6 N. R. 33 EBM	33.33	2241.77
10- 9-19	35	112	George L. Walker	Lots 3 and 4, Sec. 3, Tp. 5 N. R. 33 EBM	80	5400.00
10- 9-19	38	108	John Tikker	NE¼ SW¼ Sec. 32, Tp. 6 N. R. 33 EBM	40	2700.00
10- 9-19	39	113	Will A. Peterson	S½ SE¼ Sec. 30, Tp. 6 N. R. 33 EBM	80	5400.00
10- 9-19	40	141	C. R. Delauter	NE¼ Sec. 34, Tp. 6 N. R. 33 EBM	160	10800.00
10- 9-19	41	122	Frank T. Brandt	NE¼ Sec. 7, Tp. 5 N. R. 33 EBM	160	10800.00
11- 1-19	42	133	Justin Tolman	E½ NW¼ Sec. 34, Tp. 6 N. R. 33 EBM	80	5400.00
10- 9-19	45	102	Moroni E. Brown	SE¼ SE¼ Sec. 34, Tp. 6 N. R. 33 EBM	33.33	2249.77
10- 9-19	47	105	G. M. Hall	NE¼ SE¼ Sec. 11, Tp. 5 N. R. 33 EBM	40	2700.00
10- 9-19	48	119	D. O. Taggart	W¼ NE½ Sec. 18, Tp. 5 N. R. 34 EBM	80	5400.00
10- 9-19	49	104	Alfred E. Campbell	Lot 2, Sec. 5, Tp. 5 N. R. 33 EBM	40	2700.00
10- 9-19	50	114	Lester J. Bell	W½ SW¼ Sec. 20, Tp. 6 N. R. 33 EBM	80	5400.00

SE¼ Sec. 2, Tp. 5 N. R. 32 EBM	160	10800.00	10-17-19	51	121	Rose Mullaly
SE¼ Sec. 14, Tp. 5 N. R. 32 EBM	160	10800.00	10-17-19	52	120	Alta Bean
E½ NW¼ Sec. 18, Tp. 5 N. R. 34 EBM	80	5400.00	10-17-19	53	135	J. M. Taggart
W½ NW¼ Sec. 34, Tp. 6 N. R. 33 EBM	80	5400.00	11- 1-19	54	132	John H. Tolman
NW¼ SE¼ Sec. 3, Tp. 5 N. R. 33 EBM	40	2700.00	11- 8-19	55	129	Thos. W. Andrews
NE¼ SW¼ Sec. 3, Tp. 5 N. R. 33 EBM	40	2700.00	11- 8-19	56	128	James V. Andrews
NE¼ Sec. 33, Tp. 6 N. R. 33 EBM	80	5400.00	11-20-19	57	137	M. R. Adams
E½ SE¼ Sec. 28, Tp. 6 N. R. 33 EBM	80	5400.00	11-28-19	59	136	G. R. Wille
NW¼ NE¼ Sec. 35, Tp. 6 N. R. 33 EBM	40	2700.00	11-12-19	60	130	R. W. Swope
N½ NE¼ Sec. 33, Tp. 6 N. R. 33 EBM	80	5400.00	12- 8-19	61	146	Jules M. King
SW¼ Sec. 33, Tp. 6 N. R. 33 EBM	146.66	9899.55	12-12-19	62	147	Max P. Splinter
N½ SW¼ Sec. 29, Tp. 6 N. R. 33 EBM	80	5400.00	12-13-19	63	148	J. J. Jenkins
S½ SW¼ Sec. 29, Tp. 6 N. R. 33 EBM	80	5400.00	12-13-19	64	149	Earl C. Reinhardt
NW¼ Sec. 32, Tp. 6 N. R. 33 EBM	160	10800.00	12-17-19	66	150	Max Brodie
SE¼ Sec. 29, Tp. 6 N. R. 33 EBM	160	10800.00	12-16-19	68	151	H. G. Price
SW¼ Sec. 28, Tp. 6 N. R. 33 EBM	160	10800.00	12-16-19	69	152	Samuel H. Price
NE¼ Sec. 29, Tp. 6 N. R. 33 EBM	160	10800.00	12-31-19	70	153	Ann Matkins
NW¼ Sec. 28, Tp. 6 N. R. 33 EBM	160	10800.00	12-31-19	71	154	Mrs. Olga S. Matkins
NE¼ Sec. 32, Tp. 6 N. R. 33 EBM	160	10800.00	12-31-19	72	155	Effie N. Maybury
NE¼ Sec. 21, Tp. 6 N. R. 33 EBM	160	10800.00	12-31-19	73	156	William H. Mitchell
SE¼ Sec. 32, Tp. 6 N. R. 33 EBM	146.66	9899.55	12-31-19	74	157	Alexander Johnston
Lots 1 and 2 &			12-31-19	75	158	Arch Brown
S½ NE¼ Sec. 1, Tp. 5 N. R. 32 EBM	160	10800.00				
NW¼ Sec. 13, Tp. 5 N. R. 32 EBM	160	10800.00	12-31-19	76	159	T. R. Taylor

12-31-19	77	160	J. E. Burnett	SE¼ Sec. 12, Tp. 5 N. R. 32 EBM	160	10800.00
12-31-19	78	161	L. C. Vermillion	E½ NW¼ NE¼ SW¼ NW¼ SE¼ Sec. 11, Tp. 5 N. R. 33 EBM	160	10800.00
12-31-19	79	162	H. A. Marrow	NW¼ Sec. 10, Tp. 5 N. R. 33 EBM	160	10800.00
12-31-19	80	163	R. H. Bailey	SE¼ SE¼ Sec 5; S½ SW¼ SW¼ SE¼ Sec. 4, Tp. 5 N. R. 33 EBM	160	10800.00
12-31-19	81	164	Wm. S. Mullen	Lots 3 and 4 S½ NW¼ Sec. 1, Tp. 5 N. R. 32 EBM	160	10800.00
12-31-19	82	165	H. A. Wishard	NW¼ Sec. 9, Tp. 5 N. R. 33 EBM	160	10800.00
12-31-19	83	166	J. C. Allard	NE¼ Sec. 9, Tp. 5 N. R. 33 EBM	160	10800.00
12-31-19	84	167	S. F. Hobler	NE¼ Sec. 8, Tp 5 N. R. 33 EBM	160	10800.00
12-31-19	85	168	W. T. Berry	SW¼ Sec. 7, Tp. 5 N. R. 33 EBM	160	10800.00
12-31-19	86	169	Guy Johnson	SE¼ Sec. 7, Tp. 5 N. R. 33 EBM	160	10800.00
12-31-19	87	170	L. C. Reese	Lot 3, E½ SW¼; SW¼ SE¼ Sec. 5 Tp. 5 N. R. 33 EBM	160	10800.00
12-31-19	88	171	M. K. Dennis	NE¼ Sec. 13, Tp. 5 N. R. 32 EBM	160	10800.00
12-31-19	89	172	Frank B. Sargent	S½ SE¼ Sec. 12, Tp. 5 N. R. 33 EBM W½ SW¼ Sec. 7 Tp. 5 N. R. 34 EBM	138.73	9364.26

II.

That there are outstanding 750 bonds of the aggregate principal amount of $500,000.00, which said bonds are now due and payable, together with interest thereon at 7% per annum from January 1, 1920, and each of said bonds and the interest thereon is secured by the said deed of trust or indenture of mortgage, and each and every of said bonds is entitled without preference or priority of one over the other, to the benefit afforded as security by said deed of trust.

III.

That there is at the date of this decree owing and unpaid on said outstanding bonds of the defendant Pingree Land Company, and secured by said mortgage or deed of trust for principal and interest, the following amounts, no part of which have been paid, to-wit:

Principal	$500,000.00
Interest	59,208.00
Amount due for principal and interest at date of this decree.	$559,208.00

IV.

That the complainant is entitled to a reasonable compensation for services rendered by it pursuant to the provisions of said trust deed, and to the payment or reimbursement, as the case may require, of all expenses and charges whatsoever, made, incurred or suffered by it in or about the

execution of the trust, including solicitors', counsel fees, and all other obligations incurred by it in respect to its attorneys, agents or employees; and it is ORDERED, ADJUDGED and DECREED that the reasonable compensation of the complainant in and about the premises is the sum of $500.00, and that the complainant has made disbursements in and about the premises in the sum of $350.00, and has incurred obligations for counsel and attorneys fees in the sum of $5,500.00, which all parties interested have agreed is a reasonable attorney's fee to be allowed herein, all of which sums are secured by said trust deed and by the contracts deposited with complainant.

V.

That the property covered by the trust deed, including the contracts in the hands of the complainant, should be sold as an entirety and without redemption by the said Master Commissioner hereinafter named, unless the amount found due herein shall be paid prior to the date hereinafter fixed.

VI.

That the lien of the defendant Boise-Payette Lumber Company sought to be asserted herein by cross-bill, is a valid and subsisting lien upon the pump house and the lands upon which the same was erected and is now situated, to-wit: The SW¼ of the SW¼ of section 14; the NW¼ of the NW¼ of section 23, the NE¼ of the NE¼, section 22, and the SE¼ of the SE¼ of section 15, all in

Township 6 North, Range 34 East of the Boise Meridian, said pump house and said lands being a part of the irrigation works herein described; that the sums secured by said lien are as follows:

Principal, $1112.84; interest, $74.65; cost of preparation of lien with interest thereon $10.68; allowance for attorneys' fees, $150.00, aggregating in all the sum of $1348.17 at the date of this decree, but said lien of said cross-complainant Boise-Payette Lumber Company, is junior and inferior to the rights and interest of the complainant in and to the property covered by and described in said trust deed and said complainant is entitled to receive payment in full for all sums secured by the lien of its said trust deed before any sum from the proceeds of the sale of said property shall go to the said Boise-Payette Lumber Company; that the right and interest of the defendant Roland D. Wilkie, a minor, and the right and interest of each of the remaining defendants in and to said property, is junior and inferior to the rights and interest of complainant under its said trust deed.

VII.

That unless the defendant Pingree Land Company, or someone in its behalf, shall pay to the complainant on or before the 1st day of October, 1921, the several amounts found due hereunder, to-wit:

The sum of $500.00 for compensation to complainant;

The sum of $350.00 as and for the disbursements of complainant;

The sum of $5,500.00 as and for the compensation of complainant's solicitors and attorneys;

The sum of $559,208.00 as and for the amount due, with interest thereon to the date of the entry of this decree upon the bonds outstanding under said trust deed;

together with interest on said several sums at 7% from the date of the entry of this decree to the date of such payment, and shall pay to theholders thereof the amount due for principal and interest upon receiver's certificates, heretofore authorized by this Court, together with interest thereon to the date of such payment, and the costs and compensation of said receiver, it is ORDERED, that Myron Swendsen, the receiver heretofore appointed in this cause, who is hereby named as Special Master Commissioner to execute this decree, sell all of said mortgaged premises particularly described in paragraph 1 hereof, together with the contracts on deposit with the complainant, which contracts the complainant shall deliver to the said Special Master Commissioner at or before the date fixed for said sale, and said Special Master Commissioner shall give due notice of said sale by publication once each week for four consecutive weeks preceding the date of said sale in a newspaper published and in general circulation in Jefferson County, Idaho, but may proceed with such publication without waiting for the

time limited within which the said Pingree Land Company, or some one on its behalf, may make the payments herein decreed to be due and payable. Said notice of sale shall contain a description of the property to be sold and the terms of sale. The sale shall be made at the front door of the Courthouse in the County of Jefferson, in the State of Idaho, being the county in which said real estate and irrigation works are situated; that all of said property, real, personal and mixed, covered by the lien of said mortgage or deed of trust, including said deposited contracts, be sold in bulk and as an entirety, and all thereof without the right of redemption, the same to all intents and purposes as though all of said property were personal property.

The Special Master Commissioner is hereby empowered to adjourn said sale at any stage of the proceedings to any room in said Court House available for that purpose and convenient for the use of said Special Master Commissioner, and said Special Master Commissioner may in his discretion adjourn the sale for any reasonable time for any reason that may seem to him good and sufficient, by announcing such adjournment and the time and place to which such sale shall be adjourned, at the time appointed for such sale, and may in like manner, from time to time, adjourn such sale without further advertisement.

The property herein directed to be sold includes all reservoirs, dams, ditches, canals, flumes, gates,

and other means for the use of water and all water rights and appropriations of water herein described or referred to, embracing and including the entire irrigation system of the defendant Pingree Land Company, and all and every part and parcel and unit thereof, and all and every right, franchise, privilege, easement, lien, immunity and incident appertaining or belonging thereto, including all rights of way and including all contracts with the State of Idaho in which said Pingree Land Company is interested, and all amendments and supplements and additions thereto, and all benefits, gains, franchises, rights, privileges and easements belonging or appertaining thereto, or arising, or to arise, therefrom, all settlers' contracts hereinbefore described, of every name and nature, now in the possession of, or under the control of the complaint, together with all rights, franchises, privileges, gains, immunities and incidents arising therefrom, including all deferred payments due or to become due thereon or thereunder, and all manner of security for such payments, and especially all shares of stock of the Matkins Operating Company now owned by Pingree Land Company, and now in the possession of, or under the control of the complainant or of the receiver appointed herein.

Upon the sale of the property herein provided to be sold, any party to this suit and any holder or holders of bonds secured by said trust deed, or

any committee of bondholders, may become a purchaser or purchasers at said sale.

No bid shall be provisionally accepted at such sale by the Special Master Commissioner from any bidder who shall not have deposited with the Special Master Commissioner at or prior to the time of the same the sum of $10,000 in cash or approved certified check. The purchaser at said sale shall also pay in case at or prior to the time of confirmation of said sale, such additional amount in cash as shall be required to pay in full the expenses of the sale including the compensation of the Special Master Commissioner; all outstanding obligations incurred by the receiver, the amount of which is hereafter to be determined; all valid claims for labor and material furnished and performed within six months prior to the appointment of the receiver herein in the maintenance and operation of said irrigation system, the amount of which is hereafter to be determined; costs of suit and the charges, compensations, allowances and disbursements of the complainant including allowance for attorney's fees. Certificates of indebtedness heretofore authorized by the Court and issued by the receiver may be accepted as cash in payment of said purchase price to the amount of the par or face value thereof with accrued interest thereon.

The Court fixes no upset price for said sale, but the Court reserves jurisdiction to confirm or not confirm any sale provisionally accepted by the Spe-

cial Master Commissioner on the coming in of his report of sale.

Any deposit made by an unsuccessful bidder shall be by the Special Master Commissioner returned to him; and any deposit made by the successful bidder shall be applied on the purchase price, and a deposit made by the successful bidder may be forfeited in the event such successful bidder shall fail to comply with the terms and conditions of the sale, and in such event the Court may resell the premises, property, rights, interests, assets and franchises hereby directed to be sold; but in case the sale shall not be confirmed by the Court, any deposits or payments made by the purchaser or purchasers, or his or their successors or assigns, shall be returned to the bidder.

The balance of the purchase money, or that part of the purchase money not herein required to be paid in cash, and up to the amount of plaintiff's claim, may be paid by the purchaser or purchasers either in cash, or in bonds and the respective coupons belonging thereto, secured by said mortgage or deed of trust made by Pingree Land Company to the complainant, and bearing date December 31, 1919, and hereinbefore adjudged to be secured thereby; and such bonds and coupons shall be received at such value as would be equivalent to the distributable amount which the holder thereof would be entitled to receive from and out of the

purchase money in case the entire amount of the bid were paid in cash.

It is further ORDERED, ADJUDGED and DECREED, that the funds arising from such sale shall be applied as follows:

(a) To the payment of the expenses of the sale, including the compensation to the Special Master Commissioner;

(b) All outstanding obligations incurred by the receiver, the amount of which is hereafter to be determined, and all valid claims for labor and material furnished and performed within six months prior to the appointment of the receiver herein in the maintenance and operation of said irrigation system, the amount of which is hereafter to be determined.

(c) Costs of suit and the charges, compensation, allowances and disbursements of the complainant, including allowance for attorney's fees.

(d) To the amount found due upon the outstanding bonds secured by said trust deed, as found in this decree, together with interest thereon at 7% per annum from the date of this decree to the date of said sale.

(e) To the payment of the sums secured by the lien of the cross-complainant Boise-Payette Lumber Company as found in this decree, together with interest thereon at 7% per annum from the date of this decree to the date of said sale.

(f) Any surplus remaining in the hands of the Special Master Commissioner shall be by him retained to await the further order of this Court.

It is further ORDERED, ADJUDGED and DECREED that the Special Master Commissioner execute and deliver the deed or deeds of conveyance of the property sold to the purchaser or purchasers thereof but not until after confirmation of the sale. As soon as any sale shall have been made by the said Special Master Commissioner in pursuance of this decree, he shall report the same to this Court for confirmation, and shall from time to time thereafter make such further supplemental reports as shall be necessary to keep the Court advised of his proceedings. And said Special Master Commissioner and said complainant shall deliver to the said purchaser or purchasers, his or their successors or assigns, all and singular the premises, property, rights, interests, assets and franchises hereby directed to be sold, now or then in their possession.

It is further ORDERED, ADJUDGED and DECREED that said purchaser or purchasers of said property, and their successors and assigns, after the confirmation of said sale and the delivery of said conveyance or conveyances, shall hold and possess said property and every part thereof, and all the rights, privileges and franchises appertaining thereto, as fully and completely as the said Pingree Land Company held and enjoyed the same and was entitled to hold and enjoy the same at the date of

the said mortgage or deed of trust, which this action was brought to foreclose, and at any time since, and all the assets, money and property of every description in the custody of said receiver and in the control of this Court, including all the property and assets acquired by said receiver, both before and after the entry of this decree, and shall possess the right to enforce any contract made by the said receiver or by said Pingree Land Company in his or its own name, and shall be entitled to hold and have all and singular the property so conveyed, free and discharged from all rights, claims and liens of the defendant Pingree Land Company, and any of the other defendants herein, save and except as herein otherwise expressly provided.

VIII.

The Court reserves jurisdiction to render any deficiency decree for any amount due upon said mortgage bonds and coupons after the application thereto of the proceeds of the mortgaged property, as herein decreed, and the Court reserves, for further consideration, all matters herein not expressly provided for or adjudicated.

IX.

No matter pertaining to the rights of the settlers to and in said premises, or any part thereof, by virtue of their contracts heretofore entered into with the Pingree Land Company, and no matters pertaining to the rights of the defendant Matkins Operating Company are adjudicated by this decree, but

all such matters are left for adjudication between such parties and the purchaser or purchasers hereunder as they may hereafter arise.

X.

Any party to this action, or any parties interested herein, may at any time apply to this Court for further relief or such modification of the decree in respect to the terms and conditions of the sale or the distribution of the proceeds thereof, or in respect to any other matters not herein named, as may be meet and just and equitable, and jurisdiction of this cause is retained by this Court for all such purposes and for the purpose of enforcing the provisions of this decree.

Dated the 14th day of September, A. D. 1921.

FRANK S. DIETRICH,

Judge.

Endorsed: Filed Sept. 14, 1921.
W. D. McREYNOLDS, Clerk.
By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

PETITION FOR APPEAL.

TO THE HONORABLE F. S. DIETRICH, Judge of the above entitled court:

And now comes Boise-Payette Lumber Company, a corporation, one of the defendants in this action by J. H. Peterson and T. C. Coffin, its attorneys, and feeling itself aggrieved by the final decree of this Court entered on the 14th day of September,

1921, hereby prays that an appeal may be allowed to it from the said decree to the United States Circuit Court of Appeals for the Ninth Circuit and in connection with this petition, your petitioner herewith presents its assignments of errors.

Your petitioner also presents the stipulation entered into between the attorneys for the plaintiff and this defendant, to the effect that this appeal shall not stay proceedings upon sale of the property involved and waiving the furnishing of any bond for costs, and prays that an order may be entered dispensing with any supersedeas or cost bond, allowing this appeal.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for Defendant, Boise-Payette Lumber Company.

Copy received Oct. 15, 1921.

EDWIN SNOW,
Attorney for Plaintiff.

Endorsed: Filed Oct. 26, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

Now comes the appellant, Boise-Payette Lumber Company, a corporation, by J. H. Peterson, and T. C. Coffin, its attorneys, and in connection with its petition of appeal says, that, in the record, proceedings, and in the final decree aforesaid, manifest

error has intervened to the prejudice of the appellant, to-wit:

1. That the Court erred in not holding as a matter of law that the claim of the Boise-Payette Lumber Company as a sub-contractor for materials furnished was not superior to the mortgage or deed of trust of the plaintiff and appellee, Halloran-Judge Trust Company, in this, to-wit:

That the mortgage or deed of trust of the appellee, Halloran-Judge Trust Company, which was made, executed and delivered on December 31st, 1919, and recorded on January 26th, 1920, was not superior to a claim of lien of the sub-contractor, Boise-Payette Lumber Company, which had a subcontract for the furnishing of material to Fred A. Wilkie, the original contractor, the original contract and the work thereunder having been respectively executed and begun prior to December 31st, 1919, and the Boise-Payette Lumber Company, the appellant, as a sub-contractor being entitled to have its claim of lien relate back to and be effective as of the date when work began under the original contract, to-wit: December 30th, 1919.

WHEREFORE, The appellant prays that the decree of the United States District Court of the District of Idaho, Eastern Division, made and entered on the 14th day of September, 1921, may be reversed in so far as it is therein held that the mortgage or deed of trust of the appellee, Halloran-Judge Trust Company, is superior and prior to the claim

of lien of the appellant, Boise-Payette Lumber Company.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for Appellant.

Service of the above and foregoing Assignment of Errors, by receipt of copy thereof, admitted this 15th day of October, 1921.

EDWIN SNOW,
Attorney for Appellee.

Endorsed: Filed Oct. 26, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

ORDER ALLOWING APPEAL.

On reading the petition of the Boise-Payette Lumber Company, a corporation, one of the defendants above named, for an order allowing an appeal, and upon reading the assignment of errors of the said Boise-Payette Lumber Company, a corporation, submitted therewith, and upon due consideration of the record in said cause:

It is ordered that an appeal be allowed to the United States Circuit Court of Appeals for the Ninth Circuit from the decree made and entered in this cause on the 14th day of September, 1921, and that citation on appeal be issued, served and returned to the United States Circuit Court of Appeals for the Ninth Circuit in accordance with law;

It appearing to the Court that all the parties

interested in the appeal in this cause have filed in this Court their stipulation waiving supersedeas and cost bond, the appeal is hereby allowed without the furnishing of any bond whatever on behalf of the appellant, Boise-Payette Lumber Company.

IN WITNESS WHEREOF, I have hereunto set my hand this 12th day of October, 1921, at Pocatello, Idaho.

FRANK S. DIETRICH,
United States District Judge.

Received copy Oct. 15, 1921.

EDWIN SNOW,
Attorney for Plaintiff.

Endorsed: Filed Oct. 26, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STIPULATION.

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the plaintiff and the defendant Boise-Payette Lumber Company, a corporation, that upon the allowance by the Court of the appeal on behalf of the Boise-Payette Lumber Company no bond for costs on said appeal need be required; that no supersedeas bond is desired or sought by said appellant; that the pendency of said appeal shall in no manner stay any proceedings in execution of the decree in this cause and the judicial sale held thereunder shall be and remain in all re-

spects as valid as if said appeal had not been taken irrespective of the results of said appeal.

That in order to protect the interests of appellant pending said appeal there shall be deposited with the clerk of the above entitled Court, out of such proceeds of said judicial sale as are by the terms of said decree payable to plaintiff, a sum equal to the claim of said defendant Boise-Payette Lumber Company as found in said decree, said sum to remain on deposit with said Court pending and to abide the outcome of said appeal.

Dated this 12th day of October, 1921.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for Boise-Payette Lumber Company.
EDWIN SNOW,
Attorneys for Plaintiff.

Endorsed: Filed Oct. 13, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CITATION.

UNITED STATES OF AMERICA,—ss.

TO HALLORAN-JUDGE TRUST COMPANY, a corporation, as Trustee, plaintiff above named, GREETING:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Ap-

peals for the Ninth Circuit at San Francisco, California, within thirty days from the date of the service of this citation pursuant to an appeal filed in the office of the Clerk of the District Court of the United States for the District of Idaho, Eastern Division, wherein Boise-Payette Lumber Company, a corporation, is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable F. S. Dietrich, Judge of the United States District Court for the District of Idaho, Eastern Division, this 12th day of October, in the year of our Lord One Thousand Nine Hundred and Twenty-one.

FRANK S. DIETRICH,
Judge of United States District Court.

(SEAL)

Attest:
W. D. McREYNOLDS, Clerk.

Service admitted Oct. 15, 1921.

EDWIN SNOW,
Attorney for Plaintiff

Endorsed: Filed Oct. 26, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PRAECIPE FOR RECORD.

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the United States Circuit Court of Appeals for the Ninth Circuit by including therein the following:

1. Agreed Statement of Fact.
2. Memorandum Decision, filed August 30, 1921.
3. Decree made and entered September 14th, 1921.
4. Petition for appeal.
5. Assignment of Errors.
6. Order Allowing Appeal.
7. Stipulation Waiving Bond.
8. Citation on Appeal.
9. This Praecipe.
10. Notice of Filing Praecipe.
11. Clerk's Return.
12. Such other papers as from the record in this cause of right should be included in the said transcript of the record on appeal.

J. H. PETERSON,
T. C. COFFIN,
Attorneys for Appellant.

Endorsed: Filed Oct. 26, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

NOTICE OF FILING PRAECIPE.

To EDWIN SNOW, Attorney for Appellee:

PLEASE TAKE NOTICE that on the 13th day of October, 1921, the undersigned filed with the Clerk of this Court a Praecipe for the record to be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit on appeal taken in the above cause, a copy of which praecipe is herewith served upon you.

Dated this 13th day of October, 1921.

J. H. PETERSON,
T. C. COFFIN,
Attorney for Appellant.

Service of the foregoing Notice of Filing Praecipe together with copy of Praecipe for Record admitted this 15th day of October, 1921.

Attorney for Appellee.
EDWIN SNOW,

Endorsed: Filed Oct. 26, 1921.
W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages

numbered 1 to 45, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, together, constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein.

I further certify that the cost of the record herein amounts to the sum of $52.90 and that the same has been paid by the Appellant.

Witness my hand and the seal of said Court this 23rd day of November, 1921.

W. D. McREYNOLDS,

(SEAL) *Clerk.*

No. 3802

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

BOISE-PAYETTE LUMBER COMPANY, a Corporation,

Appellant,

VS.

HALLORAN-JUDGE TRUST COMPANY, a Corporation, as Trustee,

Appellee.

Brief of Appellant

On Appeal from the United States District Court, District of Idaho, Eastern Division

HON. F. S. DEITRICH, Judge

J. H. PETERSON,
T. C. COFFIN,
Residence, Pocatello, Idaho,
Attorneys for Appellant.

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

BOISE - PAYETTE LUMBER COMPANY, a Corporation,

Appellant,

VS.

HALLORAN - JUDGE TRUST COMPANY, a Corporation, as Trustee,

Appellee.

Brief of Appellant

On Appeal from the United States District Court, District of Idaho, Eastern Division

HON. F. S. DEITRICH, Judge

This cause comes before the Court upon an agreed statement under equity rule No. 77, from which it is established that the Halloran-Judge Trust Company, the original plaintiff in the action, was a mortgagee of certain properties belonging to the Pingree Land Company, whose predecessor in interest was the Owsley Carey Land & Irrigation Com-

first portion of the clause affecting the time when the lien attaches and its priority, namely, "when the building, improvement or structure was commenced," then it could very properly be said that the claim of the Boise-Payette Lumber Company relates back to December 30th, 1919, the time when the work was commenced. If we have regard for the latter portion of the same clause, however, viz: "or materials were commenced to be furnished," then the claim of lien of the Boise-Payette Lumber Company would relate back to the first day of April, 1920, when the materials were commenced to be furnished.

We believe that a proper interpretation of the statute should be based upon its relation to those who contract directly with the owner of the structure, namely, with original contractors whose claim of lien relates back to the time when they, themselves, actually began their work or the furnishing of material. Respecting subcontractors, we believe that their claim of lien relates back not to the time that they did their work, or furnished their materials, but to the time when the improvement or structure was commenced.

We believe that the foregoing construction of the statute is sustained by the courts of California, which, in the case of McClain vs. Hutton, 131 Cal. 132, 61 Pac. 273, have passed directly upon this proposition. We also believe that the rule is properly stated in Bloom on Mechanics' Liens, in Section 488 and 489, at pages 448 and 449, as follows:

"Under this provision of Section 1186 (corresponding to 7345 of the Compiled Statutes of the State of Idaho), the cases must be divided into two categories distinguished by the existence or non-existence of a valid original contract. In the former case, the priority of the liens is to be determined by the date of the commencement of the building; in the latter, by the time the work was done or the materials were commenced to be furnished."

The California cases are based upon this proposition, that the statute required the recording of the entire building contract, including the plans and specifications, and in case it was not recorded made the contract void in so far as liens are concerned. Subcontractors, under such an original contract, which had not been properly recorded, could not claim a lien as of the date the building commenced, but only as of the date they, themselves, began work or began furnishing material, on the ground that the original contract was void, and being void, the courts indulged the fiction of a contract between the materialman or mechanics and the owner of the building sufficient at least to support a lien although not sufficient to support a personal judgment against the owner. The California courts make the distinction, however, that if the original contract was not void, then the rights of subcontractors related back to the time the building or structure was commenced.

In the case at bar, it is admitted that Fred A. Wilkie had a valid contract with the owner of the

land, and that the Boise-Payette Lumber Company furnished material to him as such original contractor, and we submit that the rule of the California decisions would therefore apply, and the rights of the Boise-Payette Lumber Company would relate back to the time Fred A. Wilkie commenced the work, namely, December 30th, 1919, and would thus be superior to the claims of the plaintiff.

Reason and logic support this view of the matter as otherwise an original contractor has no means of protecting himself. Unless he can employ subcontractors and purchase material with the understanding that the subcontractors and materialmen have a valid right to a lien superior to any mortgages attaching subsequent to the beginning of the work by the original contractor, then the original contractor is denied a line of credit which would render operations by him futile. He, himself, is personally liable to all his subcontractors and the materialmen from which he purchases material, and he is protected as against his own liability by the right to assert a lien against the property.

Respectfully submitted,

PETERSON & COFFIN,

J. A. Peterson

J. C. Coffin

Attorneys for Defendant,
Boise-Payette Lumber Company.

No. 3802

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BOISE PAYETTE LUMBER COMPANY, a Corporation, *Appellant*,

vs.

HALLORAN-JUDGE TRUST COMPANY, a Corporation, as Trustee, *Appellee*.

Brief of Appellee

On Appeal from the United States District Court, District of Idaho, Eastern Division.

HON. F. S. DIETRICH, *Judge*.

EDWIN SNOW,
Residence, Boise, Idaho,
Attorney for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BOISE PAYETTE LUMBER COMPANY, a Corporation, *Appellant*,

vs.

HALLORAN-JUDGE TRUST COMPANY, a Corporation, as Trustee, *Appellee*.

Brief of Appellee

On Appeal from the United States District Court, District of Idaho, Eastern Division.

HON. F. S. DIETRICH, *Judge*.

EDWIN SNOW,
Residence, Boise, Idaho,
Attorney for Appellee.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

BOISE PAYETTE LUMBER COMPANY, a Corporation, *Appellant*,

vs.

HALLORAN-JUDGE TRUST COMPANY, a Corporation, as Trustee, *Appellee*.

Brief of Appellee.

On Appeal from the United States District Court, District of Idaho, Eastern Division.

HON. F. S. DIETRICH, *Judge*.

The issue between the parties, and the statement of the facts raising such issue, are sufficiently and clearly stated in the brief of appellant.

The legal question involved hinges upon the construction of section 7345, Idaho Compiled Statutes, which provides:

> "The liens provided for in this chapter are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to

the time when the building, improvement or structure was commenced, work done, or materials furnished; also to any lien, mortgage or other encumbrance of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or materials were commenced to be furnished."

The above section of the Idaho Statutes has been unequivocally construed by the Supreme Court of Idaho adversely to appellant's contention in the case of Pacific States Savings Company v. DuBois, 11 Ida. 319; 83 Pac. 513, in which case the writer of the Court's opinion said:

"It seems clear to me that, when mortgages and other liens are involved in the foreclosure of mechanics' and materialmen's liens, the time or date when the building was commenced, or the laborer begun to work, or the materialman commenced to furnish the material, must be taken into consideration in determining the priority of such liens over such mortgage lien. All liens for labor commenced and materials commenced to be furnished prior to recording said mortgages are prior and superior liens to said mortgages, and the liens of all laborers for labor commenced, and materialmen for material commenced to be furnished, subsequent to the

recording of said mortgages, are subordinate to said mortgages, when such work is done and material furnished by persons not theretofore connected with the construction of the building."

The agreed statement of facts shows, of course, that appellee's mortgage was recorded January 26, 1920, and that appellant did not begin to furnish material until subsequent to April 1st, 1920. The trial court in the cause at bar considered that this construction of an Idaho statute by the highest Idaho Court was binding and controlling. (Memorandum decision, p. 13 tr.)

If further authority is necessary, it may be remarked that the State of Washington has a statute practically identical with section 7345, Idaho Compiled Statutes, and that section, (unlike California, for instance) is unmodified in its effect by the language of other sections of the statutes. The Supreme Court of the State of Washington has conclusively decided that under such a statute the priority of a lien dates from the beginning of the particular work for which the lien is claimed, or from the commencement of furnishing the particular material for which the lien is claimed.

Mechanics' Mill & Lumber Co. v. Denny Hotel Co. (Wash.) 32 Pac. 1073;

Keene Guaranty Sav. Bank v. Lawrence, (Wash.) 73 Pac. 680.

Appellant cites the case of McClain v. Hutton, 131 Cal. 132; 61 Pac. 273, and quotes from Bloom on Mechanics' Liens, sections 488 and 489, the language of the text writer being taken verbatum from the California decision first mentioned.

While it is true that the section of the California statute under discussion in the California decision (Sec. 1186, Kerr's Code of Civil Procedure) is identical with section 7345 of the Idaho statutes, the California law governing mechanics' liens contains additional provisions which are entirely missing from the Idaho statute. For instance, section 1183, Kerr's Code of Civil Procedure, provides:

> "In case of a contract for the work between the reputed owner and his contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons except the contractor to the extent of the whole contract price, and after such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor."

It is accordingly apparent that under the California law the principal contract itself operates as a lien in favor of subcontractors, materialmen or laborers, and since the lien arises out of the principal contract it might be held to relate back to the date of the principal contract. There is no such provision in the Idaho statute. Generally speaking, we would

say that the doctrine announced by the Supreme Court of California in most of its decisions with respect to the relative priority of mortgages and mechanics' liens and construing that section of the California statute which is identical with the Idaho statute, is in harmony with Pacific States Savings Company v. DuBois, *supra*, decided by the Idaho Supreme Court, these California cases being fully discussed in that decision.

Certain Montana cases and certain Federal cases arising under the laws of Montana seem also upon first or casual reading to support appellant's contention. An examination of the Montana statute, however, shows that by its terms it gives priority to mechanics' liens over any mortgage "made subsequent to the commencement of work *on any contract* for the erection of such building."

In the case of Merrigan v. English, (Mont.) 22 Pac. 454, there is pointed out the significance of the words just above italicized. The Montana Court says:

> "Section 1374 provides that the liens mentioned in section 1370 'shall be prior to and have precedence over any mortgage * * * made subsequent to the commencement of work on any contract for the erection of such building'. In California and other states the statutes on this subject read thus, 'subsequent to the commence-

ment of the work'. It is apparent that in such states the lien is not prior to those mortgages which are recorded prior to the commencement of the very work for which the lien is filed, so these authorities are not in point. * * *"

It must be pointed out that the agreed statement of fact nowhere discloses that the work under Wilkie's principal contract was commenced prior to the recording of the mortgage, or that work was begun on this contract or the material furnished by appellant without notice of a mortgage on the part of either or both Wilkie and appellant.

> "The burden of proving that the building operations were commenced before the execution of a mortgage on the land is on the mechanic and in the absence of such proof the mortgage has priority."

Davis v. Alvord, 94 U. S. 545; 24 L. Ed. 283.

It seems conclusive that the decision of the trial Court is correct, and should be affirmed.

Respectfully submitted,

.....Edwin. Snow.....

Attorney for Appellee,
Halloran-Judge Trust Company.

No. 3803

United States Circuit Court of Appeals

For the Ninth Circuit.

M. LAMBERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Nevada.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3803

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Names and Addresses of Attorneys of Record.

Mr. M. B. MOORE, Reno, Nevada,
For the Plaintiff in Error.

Hon. WM. WOODBURN, United States Attorney for the District of Nevada, Reno, Nevada, and M. A. DISKIN, Esq., Asst. U. S. Attorney for the District of Nevada, Reno, Nevada,
For the Defendant in Error. [1*]

In the District Court of the United States, in and for the District of Nevada.

No. 5457.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

M. LAMBERT,
Defendant.

Stipulation Re Bill of Exceptions.

IT IS HEREBY STIPULATED by and between William Woodburn, United States District Attorney for the District of Nevada, and M. B. Moore, of Reno, Nevada, Attorney for the Above Named, M. LAMBERT:

That the agreed statement of record on appeal may and shall constitute the bill of exceptions and complete record on writ of error when the certificate

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*Page-number appearing at foot of page of original certified Transcript of Record.

of the Clerk of the United States District Court for the District of Nevada, and the certificate of the presiding Judge of said Court, the Hon. E. S. FARRINGTON, shall be attached thereto.

Dated this 10th day of November, A. D. 1921.

WM. WOODBURN,
U. S. Attorney for the District of Nevada.
M. B. MOORE,
Attorney for Defendant.

[Endorsed]: No. 5457. Stipulation. United States of America, Plaintiff, vs. M. Lambert, Defendant. Dated November 10th, 1921. Filed Nov. 17th, 1921. E. O. Patterson, Clerk. M. B. Moore, Attorney at Law, Reno, Nevada. [3]

In the District Court of the United States, in and for the District of Nevada.

No. 5457.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

M. LAMBERT,
Defendant.

Agreed Statement for Record on Appeal.

William Woodburn, United States District Attorney for the District of Nevada, representing the plaintiff in the above-entitled action, and M. B. Moore of Reno, Nevada, attorney, and representing

the defendant in the above-entitled action, hereby agree to the following statement upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit:

1.

That on the 15th day of August, 1921, the above defendant, M. Lambert, came through Carson City, Nevada, to Reno, Nevada, driving an automobile; that he stopped his automobile on East Second Street, parking it against the curb opposite the Grand Buffet and Grand Cafe, two business houses in Reno; that while the defendant Lambert was absent from his automobile, J. P. Donnelley, the National Prohibition Director for the District of Nevada, and Jonathan Payne, a federal officer connected with the enforcement of prohibition in the District of Nevada, having had their attention directed to the said automobile by a man by the name of Edison, whose statement of information conveyed to the said Donnelley and Payne, is attached hereto, went to the point on the street where Lambert's automobile was standing at the time Lambert was not there, and neither of the officers had any warrant for his arrest, or any search-warrant whatever authorizing them to search the automobile; that the said Jonathan Payne engaged some person on [4] the street in conversation, leaning up against the tonneau; that in the tonneau of said machine was a package covered with a canvas. He reached back of him and felt of this

package, which afterwards was discovered to be a box tightly nailed up.

That he then turned facing the machine, leaned over, and looked into the tonneau and discovered a bottle about a quart in size, and about half full of a reddish liquid; the said Donnelley and Payne then stepped off on the street about fifty feet, waited until Lambert came over and got into his automobile, and started out—then jumped on the running-board of the automobile announcing that they were federal officers, and directed Lambert to drive down to the police station, which Lambert did.

2.

The officers then opened the box, which contained fifteen (15) or sixteen (16) bottles, afterwards had the contents analyzed and found it to contain intoxicating liquor. Lambert was placed under arrest and his automobile seized by the officers. Thereafter an information was filed in the United States District Court for the District of Nevada, charging Lambert with unlawfully having intoxicating liquor in his possession, and with unlawfully transporting intoxicating liquor.

After the filing of the information, and the arraignment of Lambert, a petition was filed, setting up the above state of facts, and praying that the said liquor be returned to the defendant, and that the liquor be excluded as evidence upon his trial, and that all testimony of Payne and Donnelley, relative thereto, be excluded and suppressed.

The said petition and motion was argued and the Court denied to suppress the testimony or exclude the liquor as evidence; exception to such ruling was taken and allowed. Lambert was brought to his trial, convicted, and sentenced to pay a fine of Five Hundred ($500.00) Dollars and costs, and application [5] made to the Court to confiscate and sell the automobile. Motion was made for new trial and denied, and exception taken and allowed. Petition for writ of error and other necessary steps taken to perfect the writ of error. The defendant was released upon giving bond in the sum of Fifteen Hundred ($1500.00) Dollars as supersedeas and cost bond.

The testimony of C. R. Edison, the only witness outside of Donnelley and Payne, is attached to this statement.

The contention of the defendant, as raised in said petition and motion, was and is that the search of his automobile, the seizure of its contents, and his arrest and *con*sequent trial and conviction, was and is in violation of the provisions of the Fourth Amendment of the Constitution of the United States and the Fifth Amendment of the Constitution of the United States.

WM. WOODBURN,
Attorney for the United States.
M. B. MOORE,
Attorney for the Defendant. [6]

In the District Court of the United States, in and for the District of Nevada.

No. 5457.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. LAMBERT,

Defendant.

Testimony of C. R. Edison, for Plaintiff.

C. R. EDISON, a witness called by the plaintiff, after being sworn, testified as follows:

Direct Examination by Mr. DISKIN.

Q. What is your name, Mr. Edison?

A. C. R. Edison.

Q. Where do you live?

A. Wadsworth, Nevada.

Q. What is your business or occupation at the present time?

A. Well, I haven't any at the present time—out of employment.

Q. When you were working what was your position?

A. I was deputy special officer in the United States Indian Service.

Q. Were you employed by the Government on or about the 25th of August, this year?

A. I was not.

(Testimony of C. R. Edison.)

Q. You were not following any employment at that time? A. No.

Q. Do you know the defendant in this case, M. Lambert? A. I have seen him before.

Q. Where did you see him?

A. The first time I saw him was out here at the foot of the Washoe grade.

Q. That is in Ormsby County, is it?

A. Yes. [7]

Q. How far, approximately, is the Ormsby grade from Reno?

A. I should think about thirty miles.

Q. Where was the defendant Lambert when you first saw him?

A. Standing in front of Dick Bright's Tavern.

Q. Dick Bright's Tavern, is that a roadhouse, do you know? A. Yes, sir.

Q. And where were you?

A. I stopped on the opposite side of the road with my car.

Q. When you saw the defendant what was he doing? A. Going towards the car.

Q. Did he have a car? A. He did.

Q. What kind of a car was it? A. Locomobile.

Q. Did you at that time make any examination of the car in reference to the license?

A. Yes, sir.

Q. And what did it disclose?

(Testimony of C. R. Edison.)

A. The first three numbers in this car was three fives.

Q. You don't remember the last three numbers?

A. I do not.

Q. Was it a Nevada or some other license?

A. It was a California license.

Q. How close did you come to this car at the time you first saw the defendant?

A. Oh, probably fifty feet, might have been seventy-five.

Q. Did you see the defendant do anything in respect to this car at that time?

A. I saw him step up on the running-board and put a bottle down in the car.

Q. How far away from the defendant were you?

A. I was standing in front of my car.

Q. And your car was how far from his car?

A. Oh, possibly between fifty and seventy-five feet.

Q. Were you able to distinguish what kind of a bottle it was? [8]

A. It looked like a whiskey bottle to me.

Q. About that size?

A. Yes, it looked like a quart bottle.

Q. Did you notice where he got the bottle from?

A. I did not; he seemed to have it in his hand when he walked up to the car.

Q. And dropped it in the car?

(Testimony of C. R. Edison.)

A. Just put it over the edge of the car, and laid it down.

Q. Was he near the center of the car or in front of the car? A. Right along at the back seat.

Q. Then what did he do?

A. Got in his car and drove off.

Q. What did you do?

A. After I filled my radiator I got in my car and followed him.

Q. You followed him?

A. That is, I went on up to Reno.

Q. You went from Carson City to Reno?

A. Yes.

Q. Do you know whether or not the defendant was ahead of you on the road? A. He was.

Q. When did you next see the defendant?

A. Well, I overtook the car about, oh, six or seven miles from there; I drove up pretty close behind him, and then he went on and met me again, and I didn't see him again until I got in Reno, I drove right along up beside of his car; his car was parked on Second Street.

Q. In front of what place?

A. It was just about in front of the Grand, a little up above from the Grand; in front of the Grand Cafe, or Grand Saloon it is called.

Q. Was any one in the car at the time you saw it at that place? A. There was not.

Q. Did you make any investigation of the car at that time?

(Testimony of C. R. Edison.)

A. I walked alongside of it and looked in it. [9]

Q. Did you see anything?

A. I seen the bottle that he put in the car.

Q. Did you make an examination of the bottle in the car? A. No.

Q. Do you know whether it contained any substance? A. It looked like it had whiskey in it.

Mr. MOORE.—I object to the answer as not responsive.

(The reporter reads the question.)

The COURT.—Answer that yes or no. Do you know whether it contained anything?

A. It did.

Mr. DISKIN.—(Q.) Do you know the substance that was in the bottle, in reference to color?

A. The color was the color of whiskey, that I see in the bottle.

Q. Did you make any other investigation of the car?

A. Not more than to take note of what kind of a car it was, and what it looked like.

Q. Where you saw this bottle in the car, was there any covering over that portion of the car?

A. No, not any more than the car had a big box in it, and had some old clothes, trash of some kind, in it.

Q. Could you see the box plainly?

A. I could the end of it.

Q. How about the top of the box?

(Testimony of C. R. Edison.)

A. It was covered up.

Q. What did you do then, Mr. Edison?

A. I went into the saloon.

Q. What saloon? A. The Grand.

Q. The Grand Buffet? A. Yes.

Q. How far away from the Grand Buffet was this car, approximately?

A. About as far as across this room, probably fifty feet, forty or fifty. [10]

Q. About fifty feet? A. Somewheres there.

Q. You have been in the Grand Buffet a number of times? A. Yes.

Q. What is it, a soft drink parlor?

A. A soft drink parlor.

Q. Did you see the defendant in the Grand Buffet? A. I did.

Q. At that time? A. I did.

Q. How long did you remain there?

A. Just walked in and looked around and went back out again.

Q. Where did you go then?

A. Over to Mr. Donnelley's office.

Q. Thereafter did you come back to the Grand Buffet? A. I did.

Q. Did you see the car there at that time?

A. The car was gone at that time.

Q. Then where did you go?

A. I took Mr. Payne in my car and drove around the town, looking, trying to locate the car.

(Testimony of C. R. Edison.)

Q. Did you thereafter see the defendant?

A. I did after that; yes.

Q. Where did you see him?

A. In the Grand Buffet.

Q. Was he talking to any one in the Grand Buffet? A. He was.

Q. Who was he talking to? A. Ed Regan.

Q. Who is Ed Regan?

A. One of the proprietors there, I understand.

Q. Did you hear any conversation the defendant had with Regan at that time? A. I did.

Q. What was said? [11]

A. I heard Mr. Regan tell him that he could not and would not handle that kind of stuff.

Q. Was anything said about a price?

A. I heard him say he could have it for twenty.

Q. In response to that Mr. Regan said he could not handle it?

A. Mr. Regan said that he could not handle that kind of stuff.

Q. Did you thereafter see the automobile which you have described as occupied by the defendant in front of the Grand Buffet?

A. I seen the car after that, but not in front of the Grand Buffet.

Q. Where did you see it?

A. It was over on the other side of the street.

Q. Did you see Captain Donnelly and Mr. Payne there? A. I did.

(Testimony of C. R. Edison.)

Q. What did the defendant do, if anything, in reference to this car at that time?

A. He got in it and backed it away from the sidewalk, backed it right out in front, and started down the street, and Mr. Donnelly got up on the car and talked to him; I came up on the other side, and Mr. Payne got up on the same side of the car that I was on.

Q. Where did the car go?

A. We rode around with him to the police station.

Q. Were the contents of that car examined in your presence? A. It was.

Q. What was found in the car?

A. Bottles of what I would suppose to be whiskey.

Mr. MOORE.—I move that be stricken, what he supposed.

The COURT.—What he supposed may be stricken out.

Mr. DISKIN.—(Q.) You saw a number of bottles, did you? A. I did.

Q. Were they filled with any kind of a substance?

A. Yes, sir.

Q. What was the color of the substance? [12]

A. Color of whiskey.

Q. And this was the same car and the same man that you saw on the road about twenty-eight miles from Reno? A. It was.

Mr. DISKIN.—Cross-examine.

Cross-examination.

Mr. MOORE.—Q. When you first saw the defend-

(Testimony of C. R. Edison.)

ant at Dick Bright's place, at the Tavern, he was coming out of the Tavern, was he?

A. He was down at the foot of the steps, just behind his car, when I first noticed him, and I drove up and stopped my car to get some water for my radiator.

Q. You didn't see him come out of the building?

A. No.

Q. And he had a bottle in his hand, and he put that bottle in the car? A. Yes, sir.

Q. And you were about fifty or seventy-five feet away? A. I was.

Q. And that is the nearest you were to him at the time you stopped at the Bright Tavern? You didn't see that bottle open, yourself? A. No, sir.

Q. You didn't open it yourself, or make any closer or other examination than that you have already stated? A. No.

Q. Now, when you were in the Grand and overheard this conversation, I understood that you heard Mr. Regan say that he could not and would not handle that kind of stuff? A. Yes, sir.

Q. And heard the statement that he could have it for twenty; that is all that you heard?

A. Yes, sir. [13]

Q. There are many different substances on the market of similar color to that, are there not, referring to Exhibit No. 1?

A. Well, I would say there was, yes; there is several different things something like the color of whiskey.

(Testimony of C. R. Edison.)

Q. And there are many and various substances that are contained in quart bottles, and in fifth quarts, too, are there not? A. Yes.

Q. You say that you are not a Federal officer, and were not on this date? A. No, sir.

Q. Are you under pay or retainer, employed to inform against anyone? A. I am not.

Q. You volunteered all this information?

A. I simply was assisting Captain Donnelly.

Q. Well, are you employed in any manner?

A. No, sir.

Q. Or under any agreement or contract with Captain Donnelly to assist him in investigations?

A. No, sir, nothing more than personal affair.

Q. You simply volunteer your services, or do you do it at his request?

A. On this occasion, yes, sir.

Mr. MOORE.—That is all.

Mr. DISKIN.—That is all. [14]

I, A. F. Torreyson, Reporter in the United States District Court for the District of Nevada, DO HEREBY CERTIFY:

That as such reporter, I took *verbatim* shorthand notes of the testimony given and proceedings had in said court on the trial of the case of United States of America, Plaintiff, vs. M. Lambert, Defendant, No. 5457, on October 20th and 21st, 1921;

That the foregoing transcript, consisting of pages 1 to 8, both inclusive, contains a full, true and correct transcription of my shorthand notes of the testimony of C. R. Edison, a witness called by the

plaintiff, and constitutes all of the testimony given by said C. R. Edison on said trial.

Dated Carson City, Nevada, November 21, 1921.

A. F. TORREYSON. [15]

In the District Court of the United States for the District of Nevada.

October Term 1921.

Honorable E. S. FARRINGTON, Judge.

No. 5457.

VIOLATION OF NATIONAL PROHIBITION ACT.

UNITED STATES OF AMERICA

vs.

M. LAMBERT.

Judgment.

This being the time heretofore appointed for passing sentence in this case, the Court pronounced judgment as follows, addressng the defendant:

An information has been filed against you, M. Lambert, for the crime of violating the National Prohibition Act by unlawfully, willfully and knowingly transporting sixteen and one-half bottles of intoxicating liquor, containing one-half of one per centum, or more, of alcohol by volume fit for use for beverage purposes, in an automobile in and on the streets of Reno, County of Washoe, State of Nevada; and by having in your possession, unlawfully,

willfully and knowingly, intoxicating liquors containing one-half of one per centum, or more, of alcohol by volume and fit for use for beverage purposes; said crime having been committed on the 25th day of August, 1921, at Reno, Washoe County, State and District of Nevada, and within the jurisdiction of this court. You were duly arraigned upon that information, as provided by law, and on being called upon to plead thereto you pleaded not guilty. At a subsequent day you were placed on trial, by a jury of your own selection, and by the verdict of that jury you were found guilty as charged in the information. The defendant was then asked if he had any legal cause to show why the judgment of the Court should not now be pronounced against him. To which he replied that he had not.

In consideration of the law and the premises, it is hereby ORDERED AND ADJUDGED that you pay to the United States a fine of Five Hundred ($500.00) Dollars, and that you stand committed to the care of the marshal until said fine and costs, taxed at $74.65, are paid.

Dated and entered Oct. 21, 1921.

Attest: E. O. PATTERSON,
Clerk.
By O. E. Benham,
Deputy. [16]

In the District Court of the United States, in and for the District of Nevada.

No. 5457.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. LAMBERT,

Defendant.

Bail and Cost Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, M. Lambert, of the City and County of San Francisco, State of California, as principal, and Philip Curti and W. M. Doyle, of the County of Washoe, State of Nevada, as sureties, are jointly and severally held, and firmly bound in the United States of America, in the full and just sum of Fifteen Hundred ($1500.00) Dollars, to be paid to the United States of America, for which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 21st day of October, A. D. 1921.

The consideration for the foregoing bond and obligation are as follows, to wit:

WHEREAS, lately on the said 21st day of October, A. D. 1921, at the court term of the District Court of the United States in and for the District of Nevada, in a cause pending in said court between the United States of America, plaintiff, and M.

Lambert, defendant, a judgment and sentence was rendered and imposed against the said defendant as follows, to wit:

That the said M. Lambert be fined in the sum of Five Hundred ($500.00) Dollars, together with the costs of suit; and [17]

WHEREAS, the said M. Lambert obtained a writ of error from the United States Circuit Court of Appeals for the Ninth Circuit to the said United States District Court for the District of Nevada, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the United States of America citing and admonishing the United States of America to be and appear in the said court (30) days from and after the date hereof, which citation has been duly served; and

WHEREAS, the said defendant, by an order of Court heretofore duly made and entered is required to enter into a bond in the sum of Five Hundred ($500.00) Dollars to guarantee the payment of all costs in court; and

WHEREAS, the said defendant by the order of said Court has been required to enter into a bond in the sum of One Thousand ($1,000.00) Dollars for his appearance in court at such time as he may be required, and for the payment of the fines and costs imposed, and as a stay of execution and supersedeas therein.

NOW, THEREFORE, the condition of said obligation is such that if the said M. Lambert shall prosecute said writ of error to effect, and shall pay all damages and costs awarded against him on ac-

count of the suing out of the said writ of error, or on the dismissal thereof, not exceeding the sum of Five Hundred ($500.00) Dollars, in which amount we acknowledge ourselves jointly and severally bound, and shall appear in person in the United States Circuit Court of Appeals for the Ninth Circuit when said cause is reached for argument, or when required by law or rule of said court, and from day to day thereafter in said court, until such cause shall be finally disposed of, and shall abide by, and obey the judgment and all orders made by the said Court of Appeals in said cause; and shall surrender himself in execution of the judgment and sentence appealed from, as said Court may direct, if the judgment and sentence against him shall be affirmed, and if he shall appear [18] for trial in the District Court of the United States for the District of Nevada on such day or days as may be appointed for a re-trial of said cause by said District Court, and abide by and obey all orders of said Court, provided that judgment and sentence against him shall be reversed by the United States Circuit Court of Appeals, then the above obligation to be void; otherwise to remain in full force, virtue, and effect, in the sum of Fifteen Hundred ($1500.00) Dollars, in which amount we acknowledge ourselves, jointly and severally bound.

WITNESS our signatures this 25th day of October, A. D. 1921.

M. LAMBERT, (Seal)
Principal.
PHILIP CURTI, (Seal)
Surety.
W. M. DOYLE, (Seal)
Surety.

State of Nevada,
County of Washoe,—ss.

Philip Curti and W. M. Doyle, sureties on the annexed foregoing undertaking, being first duly sworn, each for himself and not one for the other, deposes and says: That he is a resident and freeholder within the County of Washoe, State of Nevada; and that he is worth the sum of Fifteen Hundred ($1500.00) Dollars, over and above all his just debts and liabilities, in property not exempt from execution.

PHILIP CURTI.
W. M. DOYLE.

Subscribed and sworn to before me this 25th day of October, 1921.

[Seal] ANNA M. WARREN,
United States Commissioner for the District of Nevada.

[Endorsed]: No. 5457. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. M. Lambert, Defendant. Bail and Cost Bond on Writ of Error. Filed Oct. 26, 1921. E. O. Patterson, Clerk. M. B. Moore, Attorney at Law, Reno Nevada. Approved

as to form and sufficiency of sureties. Wm. Woodburn. Oct. 26, 1921. E. S. Farrington, U. S. Dist. Judge. [19]

In the District Court of the United States, in and for the District of Nevada.

No. 5457.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. LAMBERT,

Defendant.

Praecipe for Transcript of Record.

To E. O. Patterson, Clerk, U. S. District Court, Carson City, Nevada.

Will you please prepare copies of the following papers in the above-entitled case for the record and bill of exceptions upon the writ of error sued out in said case?

1. Copy of agreed statement for record on appeal of William Woodburn, United States District Attorney for the District of Nevada, and M. B. Moore, attorney for the defendant.

2. Copy of testimony of C. R. Edison, witness in behalf of the Government at the trial of said cause.

3. Copy of stipulation signed by William Woodburn, United States District Attorney for the District of Nevada, and M. B. Moore, attorney for the defendant, which stipulates what shall constitute the bill of exceptions on appeal.

4. Copy of supersedeas and cost bond.

M. B. MOORE,
Attorney for Defendant.

[Endorsed]: No. 5457. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. M. Lambert, Defendant. Praecipe. Filed Nov. 25th, 1921. E. O. Patterson, Clerk. M. B. Moore, Attorney at Law, Reno, Nevada. [20]

In the District Court of the United States, in and for the District of Nevada.

No. 5457.

VIOLATION OF NATIONAL PROHIBITION ACT.

UNITED STATES OF AMERICA

vs.

M. LAMBERT.

Order Granting Defendant Ten Days to File Agreed Statement of Facts.

Good cause appearing therefor, it is ordered that the defendant herein be, and he is hereby, granted ten days from and after this date within which to file his agreed statement of facts in the United States Circuit Court of Appeals.

Done in open court this 21st day of November, 1921.

E. S. FARRINGTON,
Judge.

Attest: E. O. PATTERSON,
Clerk.
By O. E. Benham,
Deputy. [21]

In the District Court of the United States, in and for the District of Nevada.

INDICTMENT FOR VIOLATION OF NATIONAL PROHIBITION ACT.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

M. LAMBERT,
Defendant.

Certificate of Judge to Agreed Statement of Record on Appeal.

United States of America,
District of Nevada,—ss.

The foregoing was prepared and submitted to me as an agreed statement of record of appeal, which shall constitute the bill of exceptions, and I do now, in pursuance of the consent of Wm. Woodburn, U. S. Attorney for the District of Nevada, certify that it is full, true and correct, and has been set-

tled and allowed and is made a part of the record of this cause.

Done in open court this 25th day of November, 1921.

E. S. FARRINGTON,
Judge. [22]

In the District Court of the United States for the District of Nevada.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of United States of America, Plaintiff, vs. M. Lambert, Defendant, said case being No. 5457 on the docket of said court.

I further certify that the attached transcript, consisting of 23 typewritten pages numbered from 1 to 23, inclusive, contains a full, true and correct copy of the agreed statement in said case, together with the endorsements of filing thereon, as the same appears from the originals of record and on file in my office as such clerk in the city of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to $3.65, has been paid to me by Mr. M. B. Moore, attorney for the defendant in the above-entitled cause.

WITNESS my hand and the seal of said United States District Court this 25th day of November, A. D. 1921.

[Seal] E. O. PATTERSON,
Clerk U. S. Dist. Court, District of Nevada.
By O. E. Benham,
Chief Deputy. [23]

[Endorsed]: No. 3803. United States Circuit Court of Appeals for the Ninth Circuit. M. Lambert, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Nevada.

Filed November 28, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States, in and for the District of Nevada.

No. 5457.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

M. LAMBERT,

Defendant.

Citation on Writ of Error.

The United States of America,—ss.

The President of the United States to the United States of America, GREETING:

TO THE UNITED STATES OF AMERICA:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, within thirty days from the date of this writ, pursuant to a writ of error duly allowed by the District Court of the United States in and for the District of Nevada and filed in the clerk's office of said court on the 21st day of October, A. D. 1921, in a cause wherein M. Lambert is appellant and you are appellee, to show cause, if any, why the judgment and decree rendered against the said appellant as in said writ of error mentioned should not be corrected, and why speedy justice should not be done to the party in that behalf.

WITNESS the Honorable E. S. FARRINGTON, Judge of the District Court of the United States in and for the District of Nevada, this 21st day of

October, A. D. 1921, and of the Independence of the United States, the one hundred and forty-sixth.

E. S. FARRINGTON,
District Judge.

Attest: E. O. PATTERSON,
Clerk.

By————————————,
Deputy.

Service of the within citation and receipt of a copy is hereby admitted this 21st day of October, A. D. 1921.

————————————,
U. S. Attorney, District of Nevada.

[Endorsed]: No. 5457. In the District Court of the United States, in and for the District of Nevada. United States of America, Plaintiff, vs. M. Lambert. Citation. Filed Oct. 21, 1921. E. O. Patterson, Clerk.

No. 3803. United States Circuit Court of Appeals for the Ninth Circuit. Filed Nov. 28, 1921. F. D. Monckton, Clerk.

No. 3803

8-A

United States
Circuit Court of Appeals
For the Ninth Circuit

M. LAMBERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error

M. B. MOORE,
Attorney for Plaintiff in Error.

Filed this ..... day of ....., 1922.

FRANK D. MONCTON, Clerk.

By .....
Deputy Clerk.

No. 3803

United States
Circuit Court of Appeals
For the Ninth Circuit

M. LAMBERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief for Plaintiff in Error

STATEMENT OF THE CASE

I.

The above named plaintiff in error, M. LAMBERT, was arrested in the City of Reno, Washoe County, Nevada, on the 15th day of August, A. D. 1921. The agreed statement of facts show that he had driven in an automobile from Carson City, Nevada, to Reno, Nevada, and had stopped his machine on Second Street, in the City of Reno, Nevada, and while the machine was standing at the curb, J. P. Donnelley, the National Prohibition Director for the

District of Nevada, and Jonathan Payne, one of his assistants, went to Lambert's machine during his absence and found therein a box inclosed covered with a canvas, which was not examined; also a bottle lying in the tonneau of the machine near the said box about half full of reddish looking liquid. This was not examined either.

Prior to going to the machine, Donnelley had been informed by one C. R. Edison that he had seen the defendant near Carson—had seen him place a bottle with a reddish looking liquid in his car, and that the machine was standing on Second Street. Donnelley and Payne, after making the examination, retired some fifty odd feet away from the machine and waited there until the defendant came and got into his machine and started to back out away from the curb. They then went out, stepped upon the running board of the machine, showed the defendant their stars, and instructed him to drive to the Police Station, which the defendant did. Arriving at the Police station they placed him under arrest, took into their possession the bottle and box in question, also the automobile. The officers had no warrant for the arrest of the defendant, nor any search warrant for the searching of his automobile, or the seizure of the articles in question, and none had been issued.

Thereafter, the officers opened the box and examined its contents, as well as the contents of the bottle, had them analyzed and found that each contained corn whiskey.

An information was filed in the United States District Court for the District of Nevada charging the defendant with unlawful possession of intoxicating liquors and unlawfully transporting the same.

Prior to the plea to the information the defendant filed a petition in said Court praying and moving the Court for the return of the liquor in question to him, that it be suppressed and excluded as evidence against him upon his trial upon said information, and that the testimony of all witnesses relative to the search of the machine and the seizure of the liquors be excluded and suppressed, for the reason and on the grounds that the search of the machine, the seizure of the whiskey and machine, and the arrest of the defendant, were illegal and in violation of his Constitutional rights as guaranteed to him under the Fourth Amendment of the Constitution of the United States, and that the use of such testimony and evidence against him at his trial would be in violation of his Constitutional rights as guaranteed to him under the Fifth Amendment of the Constitution of the United States. The petition was denied by the Court, defendant brought to trial, convicted, sentenced to pay a fine of Five Hundred ($500.00) Dollars and costs. The necessary steps were taken to sue out a Writ of Error and an agreed statement of facts signed by the attorneys which appears in the Record, commencing on page 2 and ending on page 5 thereof. Also a stipulation filed that the said statement should constitute the Bill of Exceptions.

II.

There is but one question to be determined upon this Writ of Error, that is: Whether or not the arrest of the defendant, the search of the automobile, and the seizure of the contents thereof, and the seizure of the car, were legal? The Fourth Amend-

ment to the Constitution of the United States provides "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures should not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

That portion of the Fifth Amendment of the Constitution of the United States referred to is as follows: "Nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property without due process of law."

III.

That the search of one's person, his home, his property or effects, and the seizure thereof without a valid warrant therefor, is illegal, and that any evidence thereby secured in such search or seizure cannot be introduced or used in evidence against him at a trial upon a criminal charge growing out of his arrest as the result of such unlawful search and seizure, has been decided in the affirmative in innumerable instances, some of the leading cases are the following:

Weeks v. U. S. 232 U. S., 383, 58th L. Ed. 632;

Gouled v. U. S., In Supreme Court Advance Opinions of April 1st, 1921, page 311, published in the 65th L. Ed;

Lawrence Amos v. U. S., U. S. Supreme Advance Sheets of April 1st, 1921, page 316, also published in the 65th L. Ed;

Holmes v. U. S. 275th Fed. page 49, (opinion

from the Circuit Court of Appeals, Fourth Circuit);

Roy Louman, Appellant, v. Commonwealth of Kentucky, 13th A. L. R. Ann., page 1303; also found in the 224th Southwestern, page 860;

State of Wyoming v. Theo. Peterson, 13th A. L. R. Ann., page 1284.

IV.

The arrest of any person cannot legally be made without warrant therefor for an offense except felonies, unless committed in the presence of the officer making the arrest; and the search of a person, his property or effects, or their seizure cannot legally be made except upon lawful arrest or under the authority of a valid search warrant. This proposition is ably discussed and affirmatively decided in the following case:

Ex Parte J. Turner Rhodes, J. Turner Rhodes, v. Thomas McWilson, 1st A. L. R. Ann. page 568;

In Re: Kellam, 41st Pacific, page 960;

Roy Youman, Appellant, v. Commonwealth of Kentucky, 13th A. L. R. Ann. page 1303;

In the last cited case we find this statement by the Court: "Except that a person lawfully arrested "may be searched for property connected with the "offense, that may be used as evidence against "him, or for weapons or things that may assist es- "cape, or acts of violence, it is as great a violation "of the Constitution for an officer to search a "person, or baggage carried about by him without "a warrant authorizing it as it is to search his "premises." See:

Fidelity & G. Co. v. State, 83d So. 610, in

which we find the following statement by the Court,"The Constitutional guarantee is violated by "a search made by an officer without a warrant "of a suit-case intrusted by a passenger on alight- "ing from a train to a transfer man, who was "under suspicion of bringing liquor into the town "for unlawful sale.

"Constitutional provisions against unreasonable "searches and seizures and against compelling one "to be a witness against himself, secure the indi- "vidual in his person, his home and his property "from investigation through unbridled and unre- "strained and executive or administrative will."

People v. Marx Hausen, 3rd A. L. R. Ann. page 1505.

V.

The Government attempts to justify the arrest of the defendant, Lambert, and the search of his automobile and seizure of its contents upon two theories:

A. The information conveyed or given to the arresting officers, Donnelley and Payne by C. R. Edison, which was in substance, that he, Edison, had first seen the defendant at Dick Bright's Tavern, near Carson City, place a bottle containing a reddish liquid in his automobile, and that he followed the automobile to Reno and that it was located on Second Street in the City of Reno. We submit that this was insufficient evidence upon which to secure a search warrant to search the machine, as it amounted to nothing more than a bare suspicion in the mind of Edison that the defendant might have liquor in his possession; and the rule is well settled that a search

warrant cannot be issued except upon the filing of an affidavit stating facts sufficient to wararnt the magistrate in determining that probable cause exists that an offense has been committed against the Government and that the articles or goods in question are located at a particular place, which place must be described as well as the articles sought to be seized.

Weeks v. U. S., 232, 58th L. Ed. 632;

Gouled v. U. S., In Supreme Court Advance Opinions of April 1st, 1921, page 311, published in the 65th L. Ed;

Lawrence Amos v. U. S., U. S. Supreme Advance Sheets of April 1st, 1921, page 316, also published in the 65th L. Ed;

Holmes v. U. S. 275th Fed., page 49, (opinion from the Circuit Court of Appeals, Fourth Circuit);

Roy Youman, Appellant, v. Commonwealth of Kentucky, 13th A. L. R. Ann., page 1303; also found in the 224th Southwestern, page 860;

State of Wyoming v. Theo. Peterson, 13th A. L. R. Ann., page 1284;

U. S. v. Teaureand, 20th Fed. 620;

U. S. v. Baumart, 179th Fed. 735;

U. S. v. Michesloski, 265th Fed. 859;

In re : Rule of Court, 12,126 Fed. Cases, 3 Woods, 502.

In re: Kellam, 41st Pac. 960;

Ex Parte Rhodes, 1st A. L. R. 568.

B. That the offense was committed in the presence of the officers and that they therefore were justified in making the arrest, searching the automobile, and seizing its contents. The proposition embraced in the principle that an officer is justified in

making an arrest for a misdemeanor committed in his presence presupposes the actual knowledge of the officer that the offense is being committed in his presence, and this knowledge must be ascertained by the officer making the arrest through the senses, by seeing the same being committed, or some other means equally as convincing. The suspicion only that an offense may be committed, or might be, or had been committed, would not justify the arrest, the search, or the seizure. If such practice be allowed and be determined a legal procedure, then every traveler upon the road, whether on foot, on horseback, by carriage, automobile or otherwise, and every traveler any place, may be stopped by any officer at any time, or at any place, and his person and effects searched with the view on the part of the officer of determining whether or not an offense is being committed by him. The guarantee of the Fourth Amendment thus being destroyed and wiped away in the whim or caprice of any officer. On this proposition we cite the cases under subdivision "A" of this paragraph.

VI.

The guarantee of immunity from unreasonable search and seizure as provided in the Fourth Amendment is not confined to the person of the individual nor to the home of the individual, but extends to any of his property over which he holds and exercises the right of control, possession and dominion; that the arrest of the defendant in the manner described was unlawful there can be no question; that the search of his automobile and the seizure of its contents, and the consequent seizure of his automobile by the officers was unlawful, in our opinion cannot

be questioned. Within the term "effects" we find the reason for this assertion. The term "effects" in the Constitutional provision referred to is very very broad and includes all property of the individual which he owns, possesses or controls. It is so defined in civil proceedings, and if so defined and recognized in civil proceedings, why then, where the liberty of the individual and his Constitutional rights are involved, should it not be recognized in criminal proceedings.

In State v. Newell, 1st Mo. 248, the Court says:

"Effects in law means everything which is sub-
"ject to the laws of property and ownership,
"whether real or personal, and as to personality,
"whether of possession or in action."

In Hunter v. Case, 20th Vt. 195, the Court says:

"As effects is ordinarly used it is understood to
"mean goods, movables, and personal estate."

In Planters' Bank of Mississippi v. Sharp, 47th U. S. 301, 12th L. Ed. 447, the Court says:

"Effects means all kinds of personal estate."

Many authorities as to what constitutes effects, as used in the Constitutional provisions and the statutes, will be found cited in Words and Phrases, Vol. 3, page 2322.

VII.

The only authority found, and the one under which the officers in question acted, for the arrest of the defendant, the search of his automobile, and the seizure of its contents, and the seizure of the automobile, is found in Title II, Sec. 26, of the National Prohibition Act, which provides among other things:

"When the commissioner, his assistant, inspec-
"tors, or any officer of the law, shall discover any

"person in the act of transporting, in violation of "law, intoxicating liquors in any wagon, buggy, "automobile, etc., it shall be his duty to seize any "and all intoxicating liquors found therein being "transported contrary to law. Whenever intox- "icating liquors transported or possessed illegally "shall be seized by an officer, he shall take posses- "sion of the vehicle and team, or automobile, etc., "and shall arrest any person in charge thereof, "etc."

If it be contended that this provision of the Act gives to the officers the right and power without either warrant for the arrest of the individual or a valid warrant authorizing the search of his person or property and the seizure of such liquors, then our answer is that this section of the Act is unconstitutional. For the reason that Congress itself is without the power to pass a valid act conferring such extraordinary power and authority upon the officers, as such an act would be in direct contravention to the Fourth Amendment of the Constitution of the United States, supra. This proposition is well settled in the numerous cases hereinbefore cited, and particularly so in the following:

Ex Parte Rhodes, 1st A. L. R. 568;

In Re: Kellam, 41st Pac. 960;

Roy Youman v. Commonwealth of Kentucky, 13th A. L. R. 1303; also found in 224th Southwestern, 860.

VIII.

The courts, both State and Federal, have through a long and unbroken line of decisions universally held that the search of any one's person, home, papers or effects, and the seizure thereof with-

out a valid search warrant, was unlawful; unless the party was arrested or suspicioned of the commission of a felony, or unless there had been a warrant issued for the arrest of the party in question, and then upon his arrest his person may be searched upon a charge of a misdemeanor; and further, that an arrest may be made by an officer for a misdemeanor committed in his presence, and the person and immediate effects connected with the offense searched and taken into custody. We contend that under the light and authority of the decisions referred to, and particularly of those cited in this Brief, that the arrest of Lambert, search of his automobile, and seizure of its contents is absolutely without authority of the law, and that the Court erred in denying the petition for the return of the property and in the admission of the testimony relative to the arrest, the search and the seizure, and in denying defendant's motion for a new trial. For these reasons the writ of error should be sustained, the case reversed, and remanded to the District Court for the District of Nevada, with instructions to proceed in accordance with the rules of law as herein set forth.

Respectfully submitted,

M. B. MOORE,

Attorney for Appellant in Error.

No. 3803

United States
Circuit Court of Appeals
For the Ninth Circuit

M. LAMBERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

WILLIAM WOODBURN,
United States Attorney, for the District of Nevada.

M. A. DISKIN,
Assistant United States Attorney.
Attorneys for Defendant in Error.

No. 3803

United States
Circuit Court of Appeals
For the Ninth Circuit

M. LAMBERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Defendant in Error

ADDITIONAL STATEMENT OF FACTS.

Supplementing the recital of facts made by Plaintiff in Error, in his statement of the case, it is deemed advisable to add thereto, that the transcript of record discloses that C. R. Edison, a witness called on behalf of the Defendant in Error, testified as follows:

That he first saw Lambert and his automobile at Dick Brights' Tavern, about thirty miles from Reno, Nevada. That Lambert was coming out of the Tavern and had a whisky bottle in his hand which contained a liquid that looked like whisky and this bottle was deposited by Lambert in his car just before leaving the Tavern for Reno.

After the arrival of Lambert and his Locomobile in Reno, Edison went into the Grand Buffet (a soft-drink parlor) and while there, overhead a conversation between Ed. Regan, proprietor, and Lambert, wherein Regan stated to Lambert: "That he could not and would not handle that kind of stuff", and something was said by Lambert that Regan could have it for twenty.

All this information was obtained prior to the seizure of the liquor in the car.

GOVERNMENT'S CONTENTION.

A reading of the testimony in the case establishes beyond cavil that the officers, making the seizure in the automobile, had sufficient information to establish probable cause, by affidavit, for the issuance of a search warrant. However, it is our contention in this case that the establishment of probable cause by affidavit and the issuance of a search warrant, to search the car and seize the intoxicating liquor, is not necessary and that the seizure of the liquor in this case was fully authorized under Section 26, Title II, of the National Prohibition Act.

We do not dispute the abstract principles of law stated by Plaintiff in Error and contained in his

Brief under points numbered two, three and four, but we are unable to understand just how these principles of law are applicable to the facts in this case.

It is admitted that the search of one's person, his home, his papers or effects, without a valid warrant, is illegal, and that evidence so obtained cannot be used in a criminal charge growing out of the arrest of such person. This principle is elementary.

But this is not a case where the facts disclose that ones person, or home was searched and we respectfully submit, that a reading of the transcript will disclose that no actual search was made of the automobile, but rather, it was discovered by the officers that Lambert was unlawfully transporting intoxicating liquor within the provision of Section 26, Title II, of the National Prohibition Act.

Counsel does not contend that acts of officers in seizing the liquor and arresting the defendant were not authorized under Section 26, Title II of the National Prohibition Act. It being deemed, therefore, that this section authorizes such procedure, it must logically follow that to warrant a reversal of this case the burden is upon the Plaintiff in Error to establish:

(a) That the officers in making the seizure and arrest exceeded the authority conferred upon them under this section, or

(b) That Section 26, Title II of the National Prohibition Act is unconstitutional.

Under subdivision "a" as we have already stated, it is not contended and no complaint is made that the officers were not authorized by

Section 26 to do what they did, and therefore, the only issue presented to the Court is whether Section 26 is constitutional.

POINTS AND AUTHORITIES.

Counsel under point V of his Brief, enumerates two theories which are claimed as justification by the Government for the seizure of liquor and arrest of defendant.

We differ with counsel on his assumption that we would rely upon either of these theories as a justification or authority for our acts. Under subdivision "A" of Point V a recital of certain facts is made wherein is set forth the knowledge and information imparted to the arresting officers by Edison which tends to establish the belief that defendant was transporting liquor in his car. It is then urged that this showing, or rather these facts, were insufficient to warrant the issuance of a search warrant.

The lawfulness of the seizure in this case is not to be determined by the same rule of law which authorizes the issuance of a search warrant. Such a construction would absolutely nullify the provisions of Section 26, Title II of the National Prohibition Act.

The facts imparted to the officers by Edison constitute what may be termed "discovery" under this section that the liquor was being unlawfully transported.

Under Subdivision "B" of Point V it is urged that we justify the arrest of Lambert upon the theory that he was engaged in committing a crime

in the presence of the officers. We base our authority for the seizure and arrest upon Section 26, Title II, of the National Prohibition Act, which provides:

> "When the Commissioner, his assistants, inspectors, or any officer of law shall discover any person in the act of transporting in violation of law, intoxicating liquors in any wagon, automobile * * * it shall be his duty to seize any and all intoxicating liquor found therein being transported contrary to law. Whenever intoxicating liquors transported, or possessed illegally, shall be seized by an officer, he shall take possession of the vehicle and team or automobile * * * AND SHALL ARREST ANY PERSON in charge thereof."

We respectfully contend that under the facts as disclosed in the transcript in this case, the officers were justified and warranted in seizing the intoxicating liquors at that time being unlawfully transported by Lambert and were justified and warranted in arrest Lambert as is authorized in the foregoing section.

In our opinion the only portion of the Brief filed by Plaintiff in Error material to the issue, to be decided in this case, is the contention set forth under subdivision VII of said Brief.

Here it is earnestly contended by counsel that if the provisions of Section 26, Title II of the National Prohibition Act, give to the officers the right to arrest without a warrant any one found unlawfully transporting liquor and to seize without a search warrant intoxicating liquor so unlawfully transported, that the section is unconstitutional for

the reason that it contravenes the Fourteenth Amendment to the Constitution of the United States.

In support of this contention there is cited the case of Ex Parte Rhodes; 1st A.L.R., 568. This case, decided by the Supreme Court of Alabama, held that a Municipal Corporation could not, in view of the constitutional provision guaranteeing due process of law, authorize the arrest of a person upon a mere verbal charge of a citizen to a police officer. Attention is invited to the fact, that the same Court, in the case of Maples vs. the State, 82 Southern, page 183, held that an Act of the Legislature of the State of Alabama passed January 25th, 1919, which provided that, "Any Sheriff or arresting officer who becomes cognizant of the facts or who finds liquor in such conveyance or vehicle being illegally transported shall seize the same", was not a violation of the Constitution in reference to unreasonable seizures and that Court, at page 184 of the decision stated:

> "It is first insisted the provisions of said section as to seizure are violative of Section V of our Constitution as to unreasonable seizure. The Act provides that the Sheriff or arresting officer who becomes cognizant of the facts, or who finds liquor in such conveyance or vehicle being illegally transported as aforesaid, shall seize the same, and clearly, this is not in violation of such constitutional provision. THE CASE OF EX PARTE RHODES 79 SOUTHERN 462, 1st A.L.R., 568, CITED BY COUNSEL FOR APPELLANT IS NOT AT ALL AT VARIANCE WITH THIS CONCLUSION."
>
> (Maples vs. State; 82 Southern, 183).

It will be seen, therefore, that while the Alabama Court held in the Ex Parte Rhodes case that an ordinance providing the arrest of a person without a warrant was unconstitutional, it also decided that the Act of the Legislature which provides for the seizure of liquor unlawfully transported was not in contravention of the constitutional provision.

The Supreme Court of the United States, while not directly determining the validity of a Statute, which provides for the seizure of liquors, yet by inference seems to convey the impression that while the seizure without such provision was unlawful, if the seizure was authorized by the Statute, it would be valid. This question came before the Court in the case in re Swan, petitioner. The Court states:

" 'In some of the States authority to proceed in respect of liquors without warrant in the first instance is expressly given by Statute, but is accompanied by the provision that when the seizure is so made the property seized is to be kept in safety for a reasonable time until a warrant can be procured and it is held that should the officer neglect to obtain a warrant within such time, he will be liable as a trespasser. Kent vs. Willey; 11 Gray 368; Wesston vs. Carr, 71 Me. 356.'

"In Kennedy vs. Favor, 14 Gray, 200, Chief Justice Shaw states:

" 'The authority to seize liquors without a warrant, though sometimes necessary, is a high power and being in derivation of the common law right, it is to be exercised only where it is

clearly authorized by the Statute or rule of law which warrants it.'"

(Re Swan, 150 U.S. 637; 37 L. Ed. 1207).

Counsel also cites the case of in re Kellam, 41 Pacific, 960. In this case the Court holds that a Statute which authorizes the arrest of an individual without a warrant for an offense which is not committed in his presence, was violative of the constitutional provision. We respectfully submit that this case is not in point, and involves a factor, not an issue in this case.

The case of Youman vs. the Commonwealth of Kentucky, 224 Southwestern, 860, is urged as sustaining Plaintiff in Error's theory that Section 26 of the National Prohibition Act is unconstitutional. The reading of the facts in this case discloses that the officers, without a search warrant, or statutory or any authority entered the premises and residence of Youman and made a search and found under the floor of a small house, several gallons of whisky, which they took and carried away and the Court held that this search of the plaintiff's residence and premises was unlawful and unwarranted.

It will be seen, therefore, that counsel has cited no authority directly bearing upon the point relied upon by him to sustain a reversal, to-wit: That Section 26, Title II of the National Prohibition Act is unconstitutional.

The Federal Courts in at least two of the districts have had occasion to pass upon Section 26, Title II of the National Prohibition Act. In the case of the United States vs. Crossen, 264 Federal, 459, at page 462, the Court states:

"The careful analysis of the Act makes it apparent that in no case is a prohibition officer or agent justified in seizing intoxicating liquor or other property without a search warrant except as provided in Section 26 which makes it his duty to seize all intoxicating liquors found being transported contrary to law in a wagon, buggy, automobile, water or air-craft, or other vehicle."

We respectfully call the Court's attention to the case of the United States vs. Fenton, (District Court of Montana,) 268 Federal at 221. The facts in this case are very similar to the facts in the instant case and the Court announces this doctrine in deciding the case:

"Defendants were taken in commission of a misdemeanor, if not of a felony. Whether or not, in the circumstances of time, place, common knowledge of whisky running, information of the officers, and the incident of the arrest, the misdemanor was committed 'in the presence' of the officers (see In re Morrill (C.C.) 35 Fed. 267, and 5 Corp. Jur. 416), whether or not defendants were subject to arrest without process as at common law, as night walkers or prowlers reasonably subject to suspicion, whether or not the officers had reasonable grounds to believe defendants had committed a felony, whether or not the arrest and search are lawful, or either or both amendments violated, defendants' motions must be denied.

"An unlawful arrest of an offender does not work a pardon in his behalf, and seizure without process and by force of government property, of which it is entitled to immediate possession, does not entitle the offender to a return of the property, nor to exclusion of its use in evidence

against him. The auto and whisky, by virtue of the National Prohibition Act (41 Stat. 305), were forfeited, and thereby transferred to the United States, the moment defendants embarked upon the unlawful transportation. The United States was then vested with the right of property and possession. Even as any other owner of property in like circumstances at common law, the United States without process could recover possession by force. And however, if at all, irregularly the officers proceeded, the defendants have no right to return of the property, nor to object to its use in evidence, whatever other, if any, right or remedy they may have. See U.S. v. Stowell, 133 U.S. 16, 10 Sup. Ct. 244, 33 L. Ed. 555, and cases; Taylor v. U.S., 3 How. 205, 11 L. Ed. 559; Boyd v. U.S., 116 U.S. 623, 6 Sup. Ct. 524, 29 L. Ed. 746.

"Silverthornes Case, 251 U.S. 385, 40 Sup. Ct. 182, 64 L. Ed. 319, and cases therein cited, apply to search and seizure of the offender's papers and property and use thereof in evidence, and not to those of others, of which the offender has unlawful possession. The first violates both amendments; the second, neither, so far as return of the seized articles and their exclusion as evidence are concerned."

It might be said that a search or seizure may be reasonable, or unreasonable and we respectfully submit that the provisions of Section 26, Title II, of the National Prohibition Act does not authorize what might be termed to be an unreasonable search. As was stated by the Supreme Court of Kentucky in the case of Commonwealth vs. Marcum 24 L.R.A., New Series, page 1194 at 1197:

"The question as to whether a search or

seizure of the person of a citizen is reasonable under the Constitution is a relative one. It might not be reasonable to seize or to search the person of a citizen for a misdemeanor where he was at large in the city or country and where the circumstances would generally be such that a warrant could be secured in advance of the arrest, but it would not be reasonable to require the officers to wait for a warrant if the offense was a felony, because here the gravity of the offense and the importance to the public of the prompt seizure of the criminal overrides the unreasonableness of the search or seizure without a warrant. And so, in the case at bar, the circumstances which require the arrest of an offender against the statute are such as to make it reasonable that a peace officer should be authorized, upon the request of the conductor of a train, to arrest a violator without a warrant, and without the offense for which the arrest was to be made being done in the presence of the officer. The law, being a practical science, regards the necessities of the case, the danger to the public, and the opportunity for the escape of the offender, and arranges the remedy so as to protect the innocent, trespassing upon the liberty of the citizen as little as possible in order to secure the protection of the public. No law, therefore, can be considered unreasonable which is necessary to protect the public from violence or outrage at the hands of the lawless. And, if such a law seems to give an undue amount of absolute authority into the hands of the officers having in charge its administration, it must be remembered that this is the price that the people pay for protection; for, after all, government is but the sum total of the natural liberty of the citizen surrendered up in return for law and order and peace and safety."

Would it not be absurd to assert that if a prohibition officer met an automobile in the country twenty miles from a United States Commissioner, or Justice of the Peace and discovered intoxicating liquor being unlawfully transported, that it would be necessary for him to go before a United States Commissioner and obtain a search warrant before they could seize the liquor? And if this would be an absurd proposition can it be said that a provision of law which authorizes the seizure of such liquor, being unlawfully transported, without a warrant is an unreasonable provision? In the language of the Supreme Court of Kentucky, can it not be urged, "Because the gravity of the offense and the importance to the public of the prompt seizure without a warrant"?

In the case of the State vs. Quinn, 3 A.L.R. 1500 97 Southeastern, 62, the Supreme Court held that no unconstitutional search occurs where a police officer, on approaching the side of an automobile in which some of the occupants are drunk, seizes the bottles containing whisky in the car, and seizes the liquor and arrests the occupants of the car, although he had no warrant for such procedure.

We respectfully contend that in the instant case the testimony does not disclose that a search was made. As to what constitutes a search the case of State vs. Quinn is appropriate. The Court stated:

> There was no search in the instant case, for search implies invasion and quest and that implies some sort of force, actual or constructive, much or little. * * * The undisputed testimony in the case shows there was no exercise of

any sort of force, but on the contrary, the contrary condition was manifest to him who had eyes to see."

A Statute which provides that in all cases where an officer may seize intoxicating liquors or vessels containing them upon a warrant, he may seize the same without a warrant and keep them in some safe place for a reasonable time until he can procure such a warrant, does not contravene the constitutional provision against unreasonable searches and seizure since it merely authorizes the seizure without a warrant when such seizure can be made without the unreasonable search which is prohibited by the constitution.

State vs. McCann, 59 Me. 383;
State vs. LeClair, 86 Me., 522; 30 Atlantic, 7;
State vs. Bradley, 51 Atlantic, 816.

A Statute which authorizes officers without a warrant to arrest any person whom they may find in the act of illegally selling, transporting or distributing intoxicating liquors and to seize the liquors * * * and retain them in some place of keeping until warrants can be procured for the trial of the person and the seizure of the liquors, is constitutional.

Jones vs. Root, 6 Gray, 435. (Mass.-
Mason vs. Lathrop, 7 Gray, 354. (Mass.)

The Constitutional provision against unlawful seizures and searches is not violated by a statute which gives an officer the power to seize, without

a warrant, liquor found under circumstances warranting the belief that it is intended for sale or distribution, contrary to law, but which does not purport to confer the power of search.

State vs. O'Neill; 56 American Reports 557, 2 Atlantic, 586.

We respectfully submit that the burden is upon the Plaintiff in Error in this case to establish that the provision of Section 26, Title II of the National Prohibition Act is an unreasonable provision.

The Supreme Court of Kentucky held in the case of Keiper vs. the City of Louisville, in passing upon an ordinance adopted by the City of Louisville, which gave the right to the Police officers to enter and inspect any building or premises or place of any kind where food products are stored, or kept for sale, that:

> "While under the Constitution the people must be secure from unreasonable search there is nothing in the record to show that an unreasonable search was imposed upon the defendant * * * when the aid of the Court is invoked the person attacking the ordinance enacted under the police power must affirmatively show that as applied to him, it is unreasonable or oppressive"

(Keiper vs. City of Louisville, 154 Southwestern, page 19.)

The evidence establishes that defendant at the time of his arrest and the seizure of the liquor was actually engaged in the commission of a crime. He

was committing the crime by transporting the liquor and therefore the liquor and the automobile used for transporting same might be said to be the corpus of the crime. Section 26, Title II simply authorizes the seizure of the **corpus** of the crime and the arrest of the party found engaged in its commission.

Wherein does the Constitution of the United States, by reason of any of its provisions, safeguard or declare to be inviolate from seizure, the tools of a burglar or the implements or things used in the commission of a crime? Can it therefore be successfully maintained that a Statute which authorizes the seizure of the things by which a crime is committed; the very corpus of it, is unreasonable and violative of constitutional provision?

We earnestly insist that the record of this case clearly disclosed that the prohibition officers discovered Lambert in the unlawful transportation of intoxicating liquor and that under Section 26, Title II of the National Prohibition Act, they had a right to arrest Lambert and seize the liquor which was contained in the automobile.

The transcript further discloses that no search, as the word "search" is understood in law, was made by the prohibition officers prior to the seizure of the intoxicating liquor.

We respectfully submit that Section 26, Title II of the National Prohibition Act is not in contravention to the Fourth Amendment to the Constitution of the United States, and that the authority conferred upon the officers to make seizure of

intoxicating liquor unlawfully transported is not authorizing an unreasonable search or seizure.

Respectfully submitted,

M. A. DISKIN,
WM. WOODBURN,
Attorneys for Defendant in Error.

No. 3803

United States
Circuit Court of Appeals
For the Ninth Circuit

M. LAMBERT,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Reply Brief of Plaintiff in Error

M. B. MOORE
Attorney for Plaintiff in Error.

Filed this.....day of....., 1922.

FRANK D. MONCKTON, Clerk.

By.....
Deputy Clerk.

No. 3803

United States
Circuit Court of Appeals
For the Ninth Circuit

M. LAMBERT,

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Reply Brief of Plaintiff in Error

Under the caption "Government's Contention" in the first paragraph thereof, it is stated that a reading of the testimony in the case establishes beyond cavil that the officers making the seizure

in the automobile had sufficient information to establish probable cause for the affidavit for the issuance of the search-warrant. No citation of authority is given for this assertion, and in truth, none can be found.

The witness, Edison, did not have sufficient information or knowledge in his possession to warrant the issuance of the search-warrant, had he made an affidavit therefor. His testimony amounted to nothing more, and his knowledge amounted to nothing more than an assertion that he saw a quart bottle containing a reddish liquid in the possession of the plaintiff in error. This amounts to nothing more than a suspicion in the mind of Edison that the plaintiff in error was in possession of liquor. Before he could make a sufficient affidavit it would be necessary for him to know the fact. He testified at the trial that he overheard Ed. Regan, in Reno, say to the defendant that he could not handle that kind of stuff. What does that import? It may create a suspicion in his mind, but it doesn't prove a fact.

It is admitted in the brief that one's person, home or effects cannot be searched without a valid search-warrant, and that evidence obtained under an invalid search-warrant cannot be used in a criminal charge growing out of the arrest. It will no doubt also be admitted that a person's belongings and the effects in his possession, and his person, cannot be arrested or seized without a valid search-warrant, unless

under the conditions enumerated in our opening brief.

It is also stated in the answering brief that counsel does not contend that acts of officers in seizing the liquor and arresting the defendant were not authorized under Sec. 26, Title II of the National Prohibition Act. If, after reading the opening brief, such an opinion as this is justified, then our labor has been in vain. We endeavored to make it plain, and think we have, that the officers in making the arrest, and in all their proceedings, were absolutely without authority, and that before an arrest could have been made, or an arrest of any person driving a vehicle, automobile or other conveyance, can legally be made, the officers must proceed, notwithstanding the Section referred to, in accordance with the statutory law providing for the issuance of search-warrants and arrests; and we most emphatically assert that the officers under such circumstances cannot proceed under Sec. 26 of Title II of the Prohibition Act, except under the authority of a valid search-warrant, or when, and after they have discovered that intoxicating liquor is being unlawfully transported; and can it be claimed that at the time the officers arrested the defendant, which was when they jumped upon the running board of his car and directed him to drive to the City Jail, that they had discovered intoxicating liquor in his automobile? What had they discovered? A bottle containing a reddish liquid, and a box, the contents

of which were unknown. They entertained a suspicion at that time that the contents of the bottle were intoxicating liquor, and after their seizure of the same, and the analysis thereof, they then discovered the fact to be that it was intoxicating liquor. Now they seek to justify their act by having their discovery made at a later time relate back to their initial act and legalize the initial act, which is the reverse procedure to that contemplated by the law.

Another exemplification of the rule of action by which a great many officers are guided; that is, "That the ends justify the means". Where the great constitutional right of the people is involved, the courts will not permit that right to be swept away and destroyed for the convenience of the officers, nor for the reason that in sustaining the constitutional right of the people that some individual, manifestly guilty, might escape. The authorities cited in our brief are uniform upon these propositions.

On page 4, under the title "The Law" in the answering brief, counsel says, "The lawfulness of the seizure in this case is not to be determined by the same rule of law which authorizes the issuance of a search warrant. Such a phase would absolutely nullify the provisions of Section 26, Title II of the National Prohibition Act."

By what process of reason counsel arrives at this conclusion, we are unable to determine, and such a conclusion can only be reached by destroying and

nullifying the provisions of the Fourth Amendment to the Constitution, which are general in terms and not special.

Counsel refers to a case cited in our opening brief, Ex Parte Rhodes, 1st A. L. R. 568, and then cites as holding to the contrary, case of Maples vs. the State, 82d Southern, page 183, in which case the Supreme Court of Alabama held "That an act authorizing any Sheriff or arresting officer who becomes cognizant of the facts or who finds liquor in such conveyance or vehicle being illegally transported shall seize the same", was not unconstitutional; and all the court says in that case is that the act is not unconstitutional, and does not conflict with Ex Parte Rhodes supra. A reading of the case of Ex Parte Rhodes and the numerous cases therein cited will convince the court that the question in the case of Ex Parte Rhodes was the same as the question to be settled in the instant case, and was an entirely different question from the one in the case of Maples v. the State, 82d Southern, page 183; and if the court was now asked to determine the sole question as to whether or not Sec. 26 of Title II, was constitutional or unconstitutional on the face thereof, it would unquestionably say that the Section is constitutional, if it be construed in accordance with the provisions of the Fourth Amendment; but that if it is to be construed as being superior to the Fourth Amendment and that it is to be construed as giving the right to an

officer without actual knowledge of the facts to make an arrest and to seize a conveyance or vehicle, when and where he will, then it is unconstitutional.

In the case of Ex Parte Rhodes supra, a citizen of Birmingham informed an officer of the City of Birmingham, that Rhodes had violated one of the city ordinances, and under the ordinance of the City of Birmingham, it was provided that upon the verbal request of any citizen who informed the officer that some person had violated a city ordinance or a state law, that the officer was authorized to make the arrest. There is no difference in principle in the provisions of this ordinance and in the provisions of Sec. 26 Title II of the Prohibition Act. If the construction sought by the Government is placed upon Sec. 26, Title II, the provision of the Constitution of the State of Alabama, relative to search and seizure, is similar, if not identical, to the Fourth Amendment to the Constitution of the United States; and the Court, in commenting upon the legality of the arrest in question, says: page 571 of 1st A.L.R.

> "If the arrest under consideration was lawful, or can be made so without amending the Constitution, then this guaranty of the Bill of Rights has failed of its purpose, to secure the people from unreasonable arrests. Surely the phrase "unreasonable seizure" included an arrest like the one now under consideration. If not, it would be difficult to suppose a seizure or arrest of the person that would be unreasonable. The same is

true as to the phrase "due process of law". Surely, any seizure or arrest of a citizen is not reasonable, or any process is not "due process", merely because a legislature or a municipality has attempted to authorize it. These phrases are limitations upon the power of the legislature, as well as upon that of the other departments of government, or of their officers."

In the same opinion the learned jurist quotes from the case of Re Dorsey, 7th Port. (Ala.) 283, as follows:

"In that case, after quoting the above Section of our Bill of Rights, Justice Ormond said:

" 'By this it appears, not only that the rights asserted in this instrument are reserved out of the general powers of government, but also that this enumeration shall not disparage others not enumerated; and that any act of the legislature which violates any of these asserted rights, or which trenches on any of these great principles of civil liberty, or inherent rights of man, though not enumerated, shall be void.

" 'It cannot, I think, be successfully maintained that this last and not least important clause of the Bill of Rights is void of meaning. Is it unreasonable to suppose that the framers of this declaration knew that the principles maintained by the immortal British judges, cited in this opinion, as well as by the jurists of our own country, had been frequently called in question; and that they intended to provide against every possible infraction of our free institutions?

" 'In ascertaining the intention of the people, in the reservation of certain great rights and privileges, we should give them a broad and liberal construction, so as to effect the manifest intention of its framers. In this there is no danger. They

have asserted that they have not delegated the power to invade either of the great natural rights just cited. Does it become this court or the legislature to quibble on its terms?' "

In the same case the learned jurist quotes from the case of Sadler v. Langham, 34th Ala. 311:

"Constitutional provisions are intended as a protection to life, liberty, and property, against encroachment, intentional or otherwise, at the hands of the government. Had not the framers of our system of government supposed it possible that legislative bodies might fall into error, they would not, in their sovereign capacity, have adopted a written Constitution, superior alike over themselves and the legislature. We cannot believe that construction a sound one which indulges every reasonable presumption against the citizen, when the legislature deals with his rights, and gives him the benefit of every reasonable doubt, when his life and liberty are in jeopardy before the courts of the country."

Again in the same opinion, quoting from the case of Boyd v. U. S., 116th U. S. 616, 29th L. ed. 846:

"Illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and propetry should be liberally construed. A close and literal construction deprives them of half their efficiency, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of course to be watchful for the constitutional rights of the citizen and

against any stealthy encroachments thereon. Their motto should be, Obsta principiis. We have no doubt that the legislative body is actuated by the same motives; but the vast accumulation of public business brought before it sometimes prevents it, on a first presenation, from noticing objections which become developed by time and the practical application of the objectionable law."

Quoting again from the same opinion in the case of Pinkerton v. Verberg, 7th L.R.A. 507, a case in which a woman was arrested by a policeman under the charge that she was a prostitute or street-walker, the court says:

"The Constitution and the laws are framed for the public good, and the protection of all citizens, from the highest to the lowest; and no one may be restrained of his liberty, unless he has transgressed some law. Any law which would place the keeping and safe conduct of another in the hands of even a conservator of the peace, unless for some breach of the peace committed in his presence, or upon suspicion of felony, would be most oppressive and unjust, and destroy all the rights which our Constitution guarantees. These are rights which existed long before our Constitution, and we have taken just pride in their maintenance, making them a part of the fundamental law of the land. Whatever the charter and ordinances of the city of Kalamazoo may provide, no police officer or other conservator of the peace can constitutionally be clothed with such power as was attempted to be exercised here. No disorderly conduct; no breach of the peace, committed in the presence of the officer; no suspicion of felony."

Counsel cites in support of his position that this was a legal seizure, the case of State v. Crossen, 264th Fed. 459; and this is but a mere dictum of the Court and cannot be relied upon as an authority.

Counsel also cites as in support of his position the case of United States v. Fenton, 268th Fed. 221. From a reading of this case and the authorities cited in support of the opinion, it will become self-evident to this Court that the learned Judge writing the opinion did not give the question very mature consideration. The Court simply says that they were taken in a commission of a misdemeanor, if not of a felony; and arrives at his conclusion from the decisions cited in the case. These decisions were all based upon proceedings for the condemnation of stills and property growing out of statutes providing for the collection of revenue and taxes, in which no conviction was necessary before the articles might be condemned. The National Prohibition Act in terms repeals all acts in conflict with its provisions. Section 26, Title II of the Prohibition Act provides the only means whereby an automobile may be condemned and confiscated. It is not forfeited to the Government, as stated in the opinion, from the mere fact that liquor is being transported therein. This Section provides:

"The Court, upon conviction of the person so arrested, shall order the liquor destroyed, and unless good cause to the contrary is shown by the owner, shall order a sale by public auction of the

property seized."

And it is only after a conviction that the liquor can be destroyed or the vehicle seized can be sold.

The case of the Commonwealth v. Marcum, 24th L.R.A. New Series, page 1194, is the only case cited by counsel which is anyways near in point; but when the facts of that case are examined it will present an entirely different state of facts from those in the instant case. In that case an over act was committed, if not in the immediate presence of the officers, yet in immediate presence of numerous other people, which act, if not a felony, bordered upon a felony; and it will appear self-evident to the court that the Supreme Court of Kentucky, while not in terms disaffirming the decision of the case of Commonwealth v. Marcum, has, by all the reasoning advanced, disaffirmed it in the case of Youman v. the Commonwealth, 13th A.L.R. page 1303. In this connection we beg leave to cite the case of State v. Gleason, 4th Pac. Reporter, page 363, in which case the court holds:

"That so long as the provisions of the Constitution of that state remain as they are, that the legislature has no power to pass an act that will infringe thereon, and that the courts must yield implicit obedience thereto."

And in which last mentioned case, the court says: page 366:

"Article 4 of the amendments to the constitution of the United States is almost identical with

said section 15, and Story says that 'this provision seems indispensable to the full enjoyment of the the rights of personal security, personal liberty, and private property, and its introduction into the amendments was, doubtless, occasioned by the strong sensibility excited both in England and in America upon the subject of general warrants, almost upon the eve of the American revolution.'"

The Court further says:

"If a warrant, in the first instance, may issue upon a mere hearsay or belief, then all the guards of the common law and of the bill of rights of our own constitution to protect the liberty and property of the citizen against arbitrary power are swept away. There is no necessity of going so far, and the constitution warrants no such conclusion. The expressions of the bill of rights are very plain and very comprehensive, and cannot be misunderstood. The oath or affirmation of a complaint or information upon which a defendant is arrested in the first instance must set forth that the allegations and facts therein contained are true."

As directly in point upon the question now before the Court we beg leave to cite a case not cited in our Opening Brief, to-wit:

Tillman v. the State, 88th Southern, page 374 decided April 18th, 1921, by the Supreme Court of Florida.

This case was one wherein Tillman was charged with attempted murder growing out of the follow-

ing facts:

A Deputy Sheriff, during the night, passing along the public highway, saw Tillman, a negro, walking on the road with a jug under his arm. He stopped his machine, asked Tillman what he had, to which Tillman made some reply that the officer did not catch. The officer got out of his car and endeavored to take the jug from the possession of Tillman. Tillman drew his gun and it was discharged twice in the scuffle. Tillman broke away, taking the jug with him.

The officer testified he did not know whether it was a jug of molasses or jackass whiskey.

The Court, passing upon the question as to the right of the officer to make an arrest under such circumstances or to search the party or to seize the property, held that such a procedure was unlawful and in direct violation of the constitutional right of the citizen as prescribed under the Constitution of Florida and the Fourth Amendment to the Constitution of the United States.

We earnestly contend that if the legislature is without power to pass an act authorizing an arrest upon a warrant issued by a court of competent jurisdiction upon a complaint which is based upon hearsay, or which does not state facts sufficient to show probable cause, that there is more reason why the legislature, or Congress, is barred from passing a valid act that will authorize officers, who cannot be held responsible in damages, or otherwise, to, at

their pleasure, arrest the citizen and seize their property without warrant of any kind. It is said in the case of U. S. v. Flagg, 233 Fed. 483-84, quoting from the opinion of Judge Bradley:

"It is not the breaking of the doors that constitutes the essence of the offense, but the invasion of the indefeasible right of the personal security of the citizen where that right has not been forfeited by his conviction of some public offense." It is the invasion of this sacred right of the citizen which should be protected, and how, may we inquire, is this sacred and indefeasible right of the citizen to be protected and upheld if the officers are authorized to stop any traveler and search his machine, and then, if after they search, they find contraband liquors, arrest the individual and confiscate his property? Such procedure cannot be justified under the Constitution, and if permitted, absolutely destroys the guarantees of the Constitution, both State and Federal.

Respectfully submitted,

M. B. MOORE,

Attorney for Plaintiff in Error.

No. 3804

United States
Circuit Court of Appeals

For the Ninth Circuit.

THE BANK OF ITALY, a Corporation,
Plaintiff in Error,

vs.

F. ROMEO & CO., INC., a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

LOUIS FERRARI, Esq., Bank of Italy Bldg., San Francisco, Calif.,
Attorney for Plaintiff.

Messrs. CUSHING & CUSHING, First National Bank Bldg., San Francisco, Calif.,
Attorneys for Defendant.

In the Superior Court of the State of California, in and for the City and County of San Francisco.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Complaint.

The plaintiff complains of the defendants and for cause of action alleges:

I.

That the plaintiff is, and at all the times herein mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of California.

II.

That the defendants, F. Romeo & Co., is, and at all the times herein mentioned was, a corporation, organized and existing under and by virtue of the State of New York.

III.

That on the 2d day of May, 1919, the said de-

fendants F. Romeo & Co., were doing business in the State of California, to wit, purchasing olives and other merchandise in the State of California.

IV.

That on the 2d day of May, 1919, the said defendants, in consideration of the discount by the Bank of Italy of a certain draft dated May 2d, 1919, payable to the order of F. A. Mennillo, and drawn on F. Romeo & Co., Inc., for the sum of Five Thousand Seven Hundred Forty-three (5743.63) and 63/100 Dollars, promised and agreed to pay said draft upon maturity. [1*]

V.

That the said draft is in the words and figures following to wit:

"BANK OF ITALY.

Los Angeles, Cal., May 2, 1919. $5743.63

At sixty days sight pay to the order of F. A. Mennillo, FIFTY-SEVEN HUNDRED FORTY THREE & 63/100 DOLLARS, Value received and charge the same to the account of

To F. ROMEO & CO., Inc., 374 Washington St., New York City, N. Y.

(Signed) F. A. MENNILLO,

By (Signed C. R. MENNILLO,

Atty.-in-facts."

VI.

That said draft represented a part of the purchase price for certain olives which were shipped on the said 2d day of May, 1919, by said F. A. Mennillo

*Page-number appearing at foot of page of original certified Transcript of Record.

to the said defendants. That the said shipment of olives arrived in New York prior to the maturity of the draft hereinabove set forth and the said defendants accepted the said olives, and still have the same in their possession and have never returned or offered to return the same to the said F. A. Mennillo.

VII.

That on the said 2d day of May, 1919, the said F. A. Mennillo duly endorsed and transferred said draft to the plaintiff, the Bank of Italy, for the sum of Five Thousand Seven Hundred Forty-three and 63/100 ($5743.63) Dollars, and said Bank of Italy has ever since and now is the true and lawful owner thereof.

VIII.

That the said draft was duly presented to said F. Romeo & Co., Inc., at 374 Washington Street, New York City, New York, on the 1st day of July, 1919, and the said defendants, and each of them, refused to pay the same and still refuse to pay [2] the same.

That the said draft has not been paid nor has any part thereof been paid and that the face thereof, to wit, the sum of Five Thousand Seven Hundred Forty-three and 63/100 ($5743.63) Dollars, together with interest thereon from July 2d, 1919, at the rate of seven per cent (7%) per annum, is now due and payable.

WHEREFORE, plaintiff prays judgment against said defendants in the sum of Five Thousand Seven

Hundred Forty-three and 63/100 ($5743.63) Dollars, with interest and cost of suit.

LOUIS FERRARI,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

James A. Bacigalupi, being first duly sworn, deposes and says:

That the Bank of Italy is a corporation duly organized and existing under and by virtue of the laws of the State of California; that he is an officer, to wit, the Vice-President of said Bank of Italy.

That he has read the foregoing complaint, and that he knows the contents thereof, and that the same is true of his own knowledge, except as those matters therein stated on information and belief, and as to those matters that he believes it to be true.

JAMES A. BACIGALUPI,
Vice-president, Bank of Italy.

Subscribed and sworn to before me this 24th day of May, A. D. 1920.

[Seal] THOMAS S. BURNES,
Notary Public in and for the City and County of San Francisco, State of California. [3]

[Endorsed]: Assigned to Dept. No. 1, May 25, 1920. Bernard J. Flood, Presiding Judge.

[Endorsed]: Filed May 24, 1920. H. I. Mulcrevy, Clerk. By J. F. Dunworth, Deputy Clerk. [4]

In the Superior Court of the State of California, in and for the City and County of San Francisco.

No. 106,972.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Answer to Complaint.

Now come the defendants F. Romeo & Co., Inc., a corporation, and F. Romeo, and answering the complaint of plaintiff herein deny and allege as follows:

I.

Deny that on the 2d day of May, 1919, or at any time in said complaint mentioned, the said defendants, or either of them, were doing business in the State of California, to wit, purchasing olives and other merchandise, or olives or other merchandise, in the State of California, or were purchasing olives and other merchandise, or olives or other merchandise, in the State of California, or were doing business in the State of California.

II.

Deny that on the 2d day of May, 1919, or at any time, or otherwise, or at all, the said defendants, or either of them, in consideration of the discount by The Bank of Italy, or by anyone, of a certain or any draft dated May 2, 1919, or otherwise dated, payable to the order of F. A. Mennillo, or of anyone, drawn

on F. Romeo & Co., Inc., or upon anyone, for the sum of Five Thousand Seven Hundred Forty-three and 63/100 ($5743.63) Dollars, or any sum, or in consideration of the discount by The Bank of Italy, or by anyone, of the draft set forth in paragraph V of said complaint, or of any draft, or [5] otherwise or at all, promised and agreed, or promised or agreed, to pay upon maturity said alleged draft referred to in paragraph IV of said complaint, or the draft set forth in paragraph V of said complaint, or any draft; and in this behalf defendants allege that on or about the 2d day of May, 1919, defendant F. Romeo & Co., Inc., paid to one F. A. Mennillo on account of the purchase price of certain preserved olives for human consumption theretofore purchased or agreed to be purchased from said F. A. Mennillo by said defendant F. Romeo & Co., Inc., the sum of Eight Thousand ($8,000) Dollars, and orally promised said F. A. Mennillo that if said olives, which had theretofore been shipped by said F. A. Mennillo to the City of New York in the State of New York, should, upon examination by defendant F. Romeo & Co., Inc., at the warehouse of defendant F. Romeo & Co., Inc., at the said City of New York, prove to be of good quality and condition, as provided in the contract of purchase of said olives theretofore entered into between said F. Romeo & Co., Inc., and said F. A. Mennillo, and as represented and warranted by said F. A. Mennillo, defendant F. Romeo & Co., Inc., would accept a draft for the sum of Five Thousand Seven Hundred and Forty-three and 63/100 ($5743.63) Dollars

drawn by said F. A. Mennillo upon said F. Romeo & Co., Inc., at 374 Washington Street, New York City, N. Y., payable at sixty (60) days sight to the order of F. A. Mennillo, but that said olives upon arrival in New York were examined by defendant F. Romeo & Co., Inc., and found to be and were not of good quality and condition as required by said contract of purchase, but were spoiled and unfit for human consumption, and defendant F. Romeo & Co., Inc., therefore and thereupon refused to accept said olives and immediately notified said F. A. Mennillo and [6] plaintiff that said olives were not of good quality and condition as required by said contract of purchase, but were spoiled and unfit for human consumption and said defendant F. Romeo & Co., Inc., therefore and thereupon refused to accept said draft.

III.

Deny that the alleged draft mentioned in said complaint represented a part of the purchase price for certain or any olives which were shipped on said 2d day of May, 1919, by said F. A. Mennillo to the said defendants, or either of them, and deny that certain or any olives were shipped on the said 2d day of May, 1919, or at any time mentioned in said complaint, by said F. A. Mennillo to the said defendants, or either of them. Deny that the alleged shipment of olives mentioned in said complaint arrived in New York prior to the maturity of the draft in said complaint mentioned, or prior to the maturity of any draft, and deny that any shipment of olives was made by defendants as alleged in said

complaint, and deny that any shipment of olives mentioned in said complaint arrived in New York at any time, or at all, and deny that the said defendants, or either of them, accepted the alleged olives mentioned in said complaint and still, or still, have the same in their possession, or in the possession of either of them, and have or have never returned or offered to return the same to the said F. A. Mennillo.

IV.

As to the allegations contained in paragraph VII of said complaint defendants allege that they have no information or belief sufficient to enable them to answer the same, and basing their denial upon that ground deny that on the said 2d day of May, 1919, or at any time, or at all, the said F. A. Mennillo duly, or at all, endorsed and transferred, or [7] endorsed or transferred, the alleged draft mentioned in said complaint of the plaintiff The Bank of Italy for the sum of Five Thousand Seven Hundred and Forty-three and 63/100 ($5743.63) Dollars, or for any sum, or otherwise or at all, and deny that said The Bank of Italy has ever since, or at all, and now is, or now is, the true and lawful, or true or lawful, or any owner thereof.

V.

Deny that the said alleged draft in said complaint mentioned was duly or at all presented to said F. Romeo & Co., Inc., at 374 Washington Street, New York City, N. Y., or elsewhere, or at all, on the first day of July, 1919.

VI.

Deny that the sum of Five Thousand Seven Hundred Forty-three and 63/100 ($5743.63) Dollars, together with interest thereon from July 2, 1919, at the rate of seven (7%) per cent per annum, or at any rate, or together with any interest, or at all, or any part thereof, is now, or ever has been, due and payable, or due or payable.

As a separate defense to the alleged cause of action in said complaint set forth defendants allege:

That the alleged draft set forth in said complaint was drawn by said F. A. Mennillo upon said defendant F. Romeo & Co., Inc., as a part of the following transaction, and not otherwise, to wit:

Prior to the 2d day of May, 1919, defendant F. Romeo & Co., Inc., entered into a contract with the said F. A. Mennillo for the purchase of a large quantity of preserved olives for human consumption and of good quality and condition to be shipped by said F. A. Mennillo to defendant F. Romeo & Co., Inc., from a common shipping point in the State of California to defendant F. Romeo & Co., Inc., at the City of New York, State of New York, [8] but only after examination and approval of said olives or representative samples thereof by the defendant F. Romeo & Co., Inc., or its duly authorized representative, before said olives should be shipped; that thereafter, to wit, during the month of April, 1919, said F. A. Mennillo shipped two carloads of olives of the alleged value of Thirteen Thousand Seven Hundred Forty-three and 63/100 ($13,743.63) Dollars from said shipping point in the

State of California to defendant F. Romeo & Co., Inc., at the City of New York, in the state of New York, without first advising said F. Romeo & Co., Inc., and without giving defendant F. Romeo & Co., Inc., or any representative thereof, an opportunity to examine said olives or any sample thereof before such shipment, and without any examination or approval before such shipment by defendant F. Romeo & Co., Inc., or by any rpresentative thereof; that after such shipment and prior to said 2d day of May, 1919, said F. T. Mennillo informed defendant F. Romeo & Co., Inc., that he had made such shipment and asked defendant F. Romeo & Co., Inc., to pay the sum of Thirteen Thousand Seven Hundred Forty-three and 63/100 ($13,743.63) Dollars for said olives so shipped as aforesaid; that defendant F. Romeo & Co., Inc., refused to pay said or any sum for same because of said shipment without such examination and approval, but thereafter upon the representation and warranty which he made to defendant F. Romeo & Co., Inc., that said olives so shipped were of good quality and condition, and fit for human consumption, orally and not otherwise agreed with said F. A. Mennillo that if said F. A. Mennillo would deliver to defendant F. Romeo & Co., Inc., the bills of lading that had been issued by the carrier upon the shipment of said olives, as hereinbefore in this paragraph stated, defendant F. Romeo & Co., Inc., would advance [9] to said F. A. Mennillo on account of the purchase price of said olives so shipped as hereinbefore in this paragraph stated, the sum of Eight Thousand

($8,000) Dollars, and that if said olives so shipped as hereinbefore in this paragraph stated, should, upon examination by said F. Romeo & Co., Inc., at its warehouse in said City of New York, prove to be of good quality and condition and fit for human consumption as provided in said contract of purchase and as represented and warranted by said F. A. Mennillo as aforesaid, defendant F. Romeo & Co., Inc., would accept a draft to be drawn at sixty (60) days' sight by said F. A. Mennillo upon said F. Romeo & Co., Inc., at New York City, in the State of New York, to the order of said F. A. Mennillo for the balance of the alleged value and price of said olives so shipped as aforesaid, to wit, the sum of Five Thousand Seven Hundred Forty-three and 63/100 ($5743.63) Dollars; that pursuant to said oral agreement defendant F. Romeo & Co., Inc., on the 2d day of May, 1919, paid said sum of Eight Thousand ($8,000) Dollars to said F. A. Mennillo and received from him said bills of lading; and pursuant to said oral agreement and not otherwise said F. A. Mennillo drew the alleged draft set forth in paragraph V of said complaint; that all of the facts in this paragraph hereinbefore stated were well known to plaintiff prior to and at the date of said alleged draft and the time when same was drawn and prior to and at the endorsement, delivery or assignment of said alleged draft to plaintiff, if any; that contrary to the provisions of said contract of purchase and contrary to the warranties and representations of said F. A. Mennillo, as aforesaid, said olives so shipped as hereinbefore in this

paragraph stated were not of good quality and condition but were spoiled and not fit for human consumption; that immediately upon the arrival at said City of New York of said [10] olives so shipped as hereinbefore in this separate defense stated, defendant F. Romeo & Co., Inc. removed said olives to the warehouse of defendant F. Romeo & Co., Inc., in said City of New York and examined the same and then found for the first time that said olives were not of good quality and condition as required by the provisions of said contract of purchase and as warranted and represented by said F. A. Mennillo as aforesaid but were spoiled and not fit for human consumption, and defendant F. Romeo & Co., Inc., thereupon notified said F. A. Mennillo and plaintiff that said olives were not of good quality and condition as aforesaid but were spoiled and not fit for human consumption and that defendant F. Romeo & Co., Inc., would therefore not accept or pay said draft and offered to return said olives to said F. A. Mennillo; that said F. A. Mennillo refused to receive the same; that because said olives were not of good quality and condition as required by the provisions of said contract of purchase and as represented and warranted by said F. A. Mennillo, as aforesaid, said olives were worthless to defendant F. Romeo & Co., Inc., and were of no value, whereby defendant F. Romeo & Co., Inc., was damaged in the sum of Fourteen Thousand ($14,000) Dollars, of which neither the whole nor any part has been paid to defendant F. Romeo & Co., Inc.; that the facts hereinbefore in this paragraph stated constitute a setoff

or defense against any claim or cause of action that said F. A. Mennillo ever had, or claimed to have, or has, or claims to have, against defendant F. Romeo & Co., Inc., in respect of the alleged draft referred to in said complaint, or any alleged promise or agreement relating to said alleged draft, and said setoff or defense existed at the time of the assignment, endorsement or delivery of said alleged draft to plaintiff, if any; that by reason of the facts hereinbefore in this paragraph stated said F. A. Mennillo is, and was at the time of the assignment, [11] endorsement or delivery of said alleged draft to plaintiff, if any, indebted to defendant F. Romeo & Co., Inc. in said sum of Fourteen Thousand ($14,000) Dollars, of which neither the whole nor any part has been paid, and which sum defendants pray be set off against the alleged claim or cause of action of plaintiff against defendant F. Romeo & Co., Inc., in said complaint set forth.

WHEREFORE, defendants pray that plaintiff take nothing by its complaint herein and that defendants go hence with their costs.

CUSHING & CUSHING,
Attorneys for Defendants.

State of California,
City and County of San Francisco,—ss.

F. Romeo, being first duly sworn, deposes and says:

I am one of the defendants in the above-entitled action, and I am an officer, to wit, the President of F. Romeo & Co., Inc., a corporation, which is one

of the defendants in said action. I have read the foregoing answer to complaint and know the contents thereof, and the same is true of my own knowledge, except as to the matters therein stated on information or belief and as to those matters I believe it to be true.

F. ROMERO.

Subscribed and sworn to before me this 9th day of July, 1920.

[Seal] H. B. DENSON,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Jul. 9, 1920. H. I. Mulcrevy, Clerk. By H. Bunner, Deputy Clerk. [12]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,417.

THE BANK OF ITALY, a Corporation,

Plaintiff,

vs.

F. ROMEO & CO., INC.,

Defendant.

Verdict.

We, the Jury, find in favor of the defendant, F. Romeo & Co., Inc.

J. A. McNEAR,

Foreman.

[Endorsed]: Filed June 21, 1921. Walter B. Maling, Clerk. [13]

(Title of Court and Cause.)

Judgment on Verdict.

This cause having come on regularly for trial upon the 17th day of June, 1921, being a day in the March, 1921, term of said Court, before the Court and a jury of twelve men duly impaneled and sworn to try the issue joined herein, Louis Ferrari, Esq., appearing as attorney for plaintiff and W. H. Gorrill and Delger Trowbridge, Esqrs., appearing as attorneys for defendants; and the trial having been proceeded with on the 20th and 21st days of June, in said year and term, and oral and documentary evidence on behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the defendant F. Romeo & Co., Inc. J. A. McNear, Foreman"; and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that The Bank of Italy, a corporation, plaintiff, take nothing by this action and that said defendants go hereof without day, and that said defendants do have and recover of and from said

plaintiff their costs herein expended taxed at $262.40.

Judgment entered June 21, 1921.

WALTER B. MALING,
Clerk. [14]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Petition for an Order Granting a New Trial.

To the Honorable, the District Court of the United States, the Southern Division, for the Northern District of California, Second Division:

Comes now the Bank of Italy, plaintiff in the above-entitled action, and petitions the above-entitled Court for a new trial upon the following grounds, to wit:

I.

Irregularity in the proceedings of the Court and orders of the Court, and abusive discretion by which the said plaintiff was prevented from having a fair trial.

II.

Insufficiency of evidence in this: that said evi-

dence showed, without conflict, that all of the allegations of the complaint were true and that said defendant, F. Romeo & Co., through its President, Mr. F. Romeo, for a valuable consideration, unconditionally promised and agreed to accept the draft set forth in the complaint of plaintiff upon the arrival of the goods in question [15] in New York, and that said draft was duly presented and payment refused, and that thereby the said plaintiff suffered damage in the sum of $5,743.63, with interest, and that said sum has not been paid either by F. Romeo & Co. or by Mr. F. A. Mennillo; and further, that said evidence without contradiction supported all of the allegations contained in the complaint of said plaintiff and that no evidence was offered or received which in any way sustained any of the allegations of the answer of the defendant F. Romeo & Co.; that said evidence was further insufficient to justify verdict in favor of defendant for the reason that even if it were conceded that any evidence was offered supporting the claim of the defendant that the promise to accept and pay said draft was conditional upon the arrival of the goods in New York in a satisfactory condition, even in that contingency the acceptance, retention and sale of the goods by said defendant was sufficient to warrant a verdict in favor of plaintiff, and was not sufficient to establish the defense claimed by defendant.

III.

That the said verdict is against law for all the reasons set forth in the last subdivision.

IV.

Errors in law occurring at the trial as follows in this: that the District Court erred in the following rulings made by it on the trial of said action.

(a) Error of said Court in its ruling on evidence.

1. In sustaining defendants' objection to the following question propounded by plaintiff to the witness P. W. Lacy. Question: "When you say that he stated he would accept the draft when the goods arrived, did you use the word 'accept' in the same sense as 'honor' is used?"

EXCEPTION NUMBER 1. [16]

2. In overruling plaintiff's objection to the offer in evidence of Defendants' Exhibit "A," said objection being made on the ground that no foundation had been laid in this: that it does not appear that this contract was called to the attention of the Bank of Italy or that the Bank of Italy was in any way bound by this contract.

EXCEPTION NUMBER 2.

3. In overruling plaintiff's objection to the testimony of the witness Francisco Romeo to a conversation which transpired between Mr. Mennillo and defendant herein before they went to the bank, and in the presence of no representative of the bank; said objection was made on the ground that the conversation took place between the defendant and Mr. Mennillo before they went to the bank and on the ground that it would not be binding on the plaintiff in this action, the Bank of Italy, it having taken place outside of the presence of any of its representatives.

EXCEPTION NUMBER 3.

4. In overruling plaintiff's objection to the testimony of the witness, Francisco Romeo, to a conversation between the defendant and Mr. Mennillo; said objection was based upon the ground that it varied the terms of a written contract already offered in evidence.

EXCEPTION NUMBER 4.

5. In overruling plaintiff's objection to the question propounded by defendant to the witness Francisco Romeo. Question: "What were the instructions that you got from your firm?" Said objection was made on the ground that it was immaterial, irrelevant and incompetent, and that the witness had already testified that this transaction was authorized by the firm.

EXCEPTION NUMBER 5.

6. In sustaining defendants' objection on the ground that it was argumentative to the following question propounded [17] by plaintiff to the witness Francisco Romeo to the following question. Question: "You say that Mr. Moore would not have cashed this draft otherwise. You do not think that it would have been good banking practice for him to have cashed it if he knew that the payment was conditioned on the arrival of the goods?"

EXCEPTION NUMBER 6.

7. In overruling plaintiff's objection to the admissibility of Defendants' Exhibit "B"; said objection being made on the ground that said letter from Mr. Romeo to his firm was a self-serving declaration.

EXCEPTION NUMBER 7.

8. In overruling plaintiff's objection to the admissibility of Defendants' Exhibit "C" (a telegram from F. Romeo to F. Romeo & Co.); said objection being based on the ground that the said telegram was a self-serving declaration.

EXCEPTION NUMBER 8.

9. In overruling plaintiff's objection to the admissibility of Defendants' Exhibits "D" and "E" (copies of bills of lading); said objection being made on the ground that they are immaterial, irrelevant and incompetent in so far as the plaintiff, the Bank of Italy, is concerned.

EXCEPTION NUMBER 9.

10. In overruling plaintiffs objection to the question propounded by defendant to the witness W. O. Johnson. Question: "Was there a carload of olives shipped from Lindsay on May 9th to F. Romeo & Co. by F. A. Mennillo?" said objection being based on the ground that it is absolutely immaterial, irrelevant and incompetent and not within the issues of the case as to what may have happened on May 9th.

EXCEPTION NUMBER 10.

11. In overruling plaintiff's objection to the question propounded by counsel for defendant to the witness W. O. Johnson. Question: "If when olives are supposed to be ready to ship, when they are received by purchaser they are reddish yellow, are they [18] in good condition?" said objection being made on the ground that there was no evidence that these olives were yellow.

EXCEPTION NUMBER 11.

12. In overruling plaintiff's objection to the question propounded by defense to witness, Mrs. Marie J. Romeo, to a conversation at the Clark Hotel, Los Angeles, at which there was present no member of the Bank of Italy. Question: "What was the conversation, as well as you can remember it?" the objection of counsel for plaintiff being on the ground that the conversation took place between the defendant and Mr. Mennillo before they went to the bank, and on the ground that it would not be binding on the plaintiff in this case, the Bank of Italy, it having taken place outside of the presence of any representative of the Bank of Italy.

EXCEPTION NUMBER 12.

(b) Error of said Court in instructing the jury as follows:

1. That the said Court erred in instructing the jury in regard to the probability or improbability of the plaintiff herein accepting an oral promise of acceptance in that the Court thereby intimated to the jury that the oral agreement was to be viewed with suspicion, and that said instruction is contrary to both the law and the fact.

EXCEPTION NUMBER 13.

2. That the Court erred in instructing the jury that it was not definitely shown whether or not the bank actually paid out $5000.00, or any other amount, to F. A. Mennillo & Co. in this: that said instruction was contrary to both the law and the fact and contrary to the undisputed fact as estab-

lished in the testimony of F. A. Mennillo by deposition and in the testimony of C. R. Mennillo.

EXCEPTION NUMBER 14.

3. That the said Court erred in instructing the jury with regard to the manner in which the defendant should have [19] disposed of the olives upon their arrival, and in instructing them that unless they find that the olives were up to the contract standards or that notwithstanding their defects, the defendant accepted them and waived the defects, their verdict must be for the defendant, said instructions being contrary to both the law and the fact of this case.

EXCEPTION NUMBER 15.

(c) Error of the Court in failing to give to the jury instructions requested by the plaintiff.

This petition will be heard upon the pleadings and papers on file and upon the minutes of the Court, which said minutes shall include the clerk's minutes and all notes and memorandums which may have been kept by the Judge of said court, and also the reporter's transcript of his shorthand notes, together with the charge of the Court to the jury.

WHEREFORE, the said petitioner prays that the verdict of said jury be set aside and that a new trial be granted in the above-entitled action.

BANK OF ITALY, a Corporation.
By JAMES A. BACIGALUPI,
Vice-President,
Petitioner.

LOUIS FERRARI,
Attorney for Petitioner. [20]

Due service and receipt of a copy of the within petition is hereby acknowledged this 1st day of July, 1921.

CUSHING & CUSHING,
Attorneys for Defendants.

[Endorsed]: Filed Jul. 1, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [21]

At a stated term, to wit, the July term, A. D. 1921, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the court-room in the City and County of San Francisco, on Monday, the 12th day of September, in the year of our Lord one thousand nine hundred and twenty-one.

No. 16,417.

BANK OF ITALY

vs.

F. ROMEO & CO., INC., et al.

Order Denying Petition for New Trial.

Ordered that the memorandum opinion of Judge Dietrich on plaintiff's petition for new trial be filed and that in accordance with said opinion the petition for new trial be and the same is hereby denied. [22]

(Title of Court and Cause.)

Memorandum Opinion Denying Petition for New Trial.

Sept. 10, 1921.

LOUIS FERRARI, Attorney for Plaintiff.

WM. H. GORRILL and DELGER TROWBRIDGE, Attorneys for Defendants.

DIETRICH, District Judge:

At the time of the trial I entertained and I still entertain grave doubt whether testimony is receivable for the purpose of establishing the oral agreement or contract pleaded by the plaintiff, but, constrained by certain decided cases apparently supporting the plaintiff's view, and without the time to give the matter thorough consideration, I resolved the question in its favor. The instant case is a striking illustration of the peril to commercial transactions of recognizing the validity of oral understandings. If the obligation to pay was to be absolute there was no conceivable reason why the plaintiff should, not have taken Romeo's signature. But however that may be, I entertain no doubt as to the correctness of the finding of the jury. Indeed, it is a serious question whether, if the verdict were for the plaintiff, a Court should permit it to stand. In the light of the circumstances, the claim of an oral agreement absolutely to accept or to pay the

draft is inherently improbable, and in view of the general and unsatisfactory testimony of the bank officers, it is difficult to see how the jury could have reached a different conclusion. [23]

As to certain exceptions to the introduction of evidence, it is only to be said that, considering the nature of the testimony as to what occurred in the bank, it was thought proper to let the jury have the benefit of all the surrounding circumstances, and hence the evidence was permitted to take a fairly wide range.

Complaint is made of the reception of a telegram and letter sent by the defendant's representative in California to his home office in New York, but counsel for the plaintiff had asked him about his report to his home office and as to whether or not the home office had made any objection relative to what he had done. Under such circumstances it was thought to be only fair to the defendant that the reports themselves should be received in evidence, in order to put at rest any question as to what such reports contained, and to avoid any improper inferences from the failure of the home office to make complaint or to raise any objection immediately upon receiving them.

As to the instructions, attention has already, in the memorandum incident to the settlement of the bill of exceptions, been called to the fact that no adequate exceptions were taken to the instructions.

Besides it is not now thought that the criticism so far as it relates to the substance is well founded.

Slight changes in phraseology might have been made had attention been particularly drawn to the portions now complained of, but in substance, it is still thought, they were correct, and gave the jury a just understanding of the law. Feeling that the case was skillfully tried by counsel and fairly submitted, and that the verdict is right, I must decline to grant a new trial.

[Endorsed]: Filed Sept. 12, 1921. Walter B. Maling, Clerk. [24]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

Number 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Plaintiff's Engrossed Bill of Exceptions.

BE IT REMEMBERED, that the above-entitled action came on regularly for trial on the 17th day of June, 1921, before the above-entitled court, Honorable Frank S. Dietrich, presiding, and a jury duly

impaneled and sworn, Louis Ferrari, Esq., appearing as counsel for plaintiff and Wm. H. Gorrill, Esq., and Delger Trowbridge, Esq., appearing as counsel for defendants, and that the following proceedings were had.

Testimony of J. E. Fickett, for Plaintiff.

J. E. FICKETT was called on behalf of plaintiff, was sworn, and testified as follows:

Direct Examination.

I live at Number 43 Parkside Drive, Berkeley, California, and am a Vice-President of the Bank of Italy. For the past three and a half years I have been head of the Credit Department, and act as such for all of the branches of the Bank of Italy. I frequently examine the different branches of said Bank with reference to matters of credit. [25]

The draft you show me dated May 2, 1919, for $5,743.63 drawn on F. Romeo & Co., Inc., Number 374 Washington Street, New York City, N. Y., by F. A. Mennillo, by C. R. Mennillo, his attorney-in-fact, I have seen before, both in Los Angeles and in San Francisco, California. The records of the Bank of Italy show that it has never received payment for this draft, neither from F. Romeo & Co. nor from Mr. Mennillo, and that this draft is carried in our Suspense Account.

Testimony in Deposition of Joseph Ladato, for Defendant.

Counsel for plaintiff then read into the records the following excerpts from the deposition of JOSEPH LADATO, who was duly sworn before a duly appointed Commissioner in New York City, N. Y., and who testified as follows, on page 22:

Direct Examination.

I reside at Number 1567 Fulton Avenue, Bronx, New York City, N. Y., and am Secretary and Assistant Treasurer of F. Romeo & Co. During April, May, June and July, 1919, I was Assistant Treasurer and one of the Directors of said Company; the other officers were as follows: F. Romeo, President; G. F. Romeo, Vice-president; M. J. Romeo, Treasurer; Philip Italiano, Secretary, and E. M. Pica, Assistant Secretary. The six officers and F. H. Dassori were the Directors.

Continuing on page 25 of said deposition: F. Romeo sent through the mail two invoices attached to the two bills of lading. These bills of lading did not provide for inspection of the olives.

Continuing on page 30 of said deposition: Greek Olives are black olives which are imported from Greece, while Greek Style Olives are black olives cured in California, [26] according to the Greek process. We first began to handle Greek olives in 1917.

(Testimony of Joseph Ladato.)

Continuing on page 58: After I made the inspection of the car of Greek style olives and the first two cars of the ripe olives, a draft was presented to me by the East River National Bank for the Bank of Italy, a copy of which draft is set out in paragraph five of the complaint; I do not remember the exact date when this draft was presented, but it must have been after May 2d. It was presented after the arrival of the car of Greek style olives and the first car of ripe olives. Mr. Italiano and I were present when it was presented by the East River National Bank, by messenger. Mr. Italiano died on March 27, 1920, and I was present at his funeral. The messenger who presented the draft said nothing; the draft was presented for acceptance and not for payment. I say this, because there was no acceptance on it. No letter or other writing accompanied the draft when presented—just the usual memorandum of the banks attached to it. This memorandum is a slip of paper stating whether to pay or to accept. I do not remember the exact wording of the memorandum stating whether the draft was presented for acceptance or for payment. The draft was sent back unaccepted. I do not know where the draft is now; it must be in the hands of the Bank of Italy. The memorandum accompanying the draft must have been returned with the draft; I do not keep the memorandums. When the draft was first presented to me that day, I do not remem-

(Testimony of Joseph Ladato.)

ber whether any memorandum was attached to it; I told the messenger that we would not accept the draft as we did not find the goods satisfactory. The messenger then went back to the bank.

Cross-examination.

Continuing on page 68: Francis Romeo did not act as a representative of Romeo & Company in business transactions while in California during the summer [27] and fall of 1918. He was instructed to inspect the goods which we bought from Mr. Mennillo. The inspection was made in California. Mr. F. Romeo tried to get information for us, for goods we might buy, and give us information about market conditions in California. As to handling financial arrangements for Romeo & Company while in California, he used a letter of credit in order to pay the Mennillo invoices.

Continuing on page 69: Romeo & Company corresponded with Francis Romeo all the time he was in California during 1918 and 1919; all of the correspondence was relative to the shipment of olives under the Mennillo contract. Romeo & Company issued a letter of credit to Francis Romeo payable in California in 1919 for the account of Romeo & Company. Francis Romeo was inspecting olives shipped, or to be shipped, by Mr. Mennillo, under a contract with Romeo & Company during 1918 and 1919.

Continuing on page 70: Francis Romeo was act-

(Testimony of Joseph Ladato.)

ing in behalf of Romeo & Company in California in 1918 and 1919. Romeo & Company requested him to examine the olives shipped under the contract with Mr. Mennillo in California during 1918 and 1919. When Francis Romeo examined the olives shipped under this contract and cashed or presented the letter of credit issued by Romeo & Company, he was doing so at the request of Romeo & Company.

Continuing on page 86: The F. Romeo referred to in the testimony in these proceedings as being in California in the fall of 1918 and summer of 1919, is Francis Romeo, President of F. Romeo & Company.

Continuing on page 99: The draft was presented to me and I refused to accept it. Under the By-laws of F. Romeo & Company, I am not authorized to accept [28] a draft unless in connection with one of the three other officers. The Board of Directors of F. Romeo & Company agreed to refuse acceptance of that draft because the goods were not satisfactory, and they authorized me to so refuse the acceptance, which authorization was not in writing.

Testimony in Deposition of F. A. Mennillo, Taken on Behalf of Plaintiff.

Counsel for plaintiff then read into the records the following deposition of F. A. MENNILLO, who was duly sworn before a duly appointed Commissioner, in New York City, N. Y.

(Testimony of F. A. Mennillo.)

Direct Examination.

I reside at the Johnathan Club, Los Angeles, California. I was engaged in business during 1918 and 1919 as an olive packer in Los Angeles, California. I remember a certain contract executed by F. Romeo & Company and myself, and the original or copy of said contract is now in the files of my company in California, which contract provided for the method of shipment and acceptance of the merchandise. The olives were shipped according to contract. The contract was made between John Romeo and Philip A. Italiano, Secretary of Mr. Romeo's firm, and myself; it was executed in New York. John Romeo was not in California prior to the first shipment of olives under this contract, but F. Romeo, a member of F. Romeo's firm, was present. F. Romeo examined these olives at my plant, the shipping point, before they were shipped. I do not remember exactly the price of this particular carload of olives, but it was, more or less, about $13,-743.63, being one car of 142 barrels of Greek Style Black Olives, and 1,043 cases, one-half dozen each, Ripe Olives. I got all the money for the shipment for both cars through the Bank of Italy. As to whether or not Romeo & Company paid the purchase price of these carloads; I know [29] that a balance was left to be paid for the Bank of Italy, about $6,000.00, more or less, the market price of olives was dropping about the month of April, 1919,

(Testimony of F. A. Mennillo.)

and has been dropping since and were selling at that time around 14¢ o pound in New York. I do not remember whether our firm received any notice of rejection from F. Romeo & Company from the receipt of these olives in May, 1919, to date, but no proper rejection has been made, if any. We have received no notice of rejection of these olives as provided for by the terms of our contract with F. Romeo & Company. My brother C. R. Mennillo, has my full power of attorney, to act and appear in my behalf in any transactions covering my business, and I authorized him to conduct any negotiations or make any arrangement for the payment of the purchase price of these olives with F. Romeo & Company, or its agent. The olives shipped on the above date have not been returned to me, nor any part thereof.

Cross-examination.

In April, 1919, I was traveling and cannot state exactly where I was when the first car of olives to which I have referred, was shipped. This car was shipped on April 18, 1918. I did not see this car, but in the first part of April, I was in Lindsay with Mr. F. Romeo and Mrs. Romeo to allow inspection of olives to be shipped. I did not see the second car of olives shipped. I was paid for this shipment through the Bank of Italy; I was paid in currency put to the credit of my account in the same bank in Los Angeles. I don't know if they credited all at one time or at different times, but I got credit for the full

(Testimony of F. A. Mennillo.)

amount of the invoice for both cars. I do not know where I was on May 2d, 1919, but I was probably in New York, because that is the time when I make my Eastern trips. I never saw the letter of credit F. Romeo had in Los Angeles and which was given him by the East River National Bank. I do not know how the payments were made by [30] Romeo & Company for these two cars. The first dealings with them was had by myself and completed by my brother, C. R. Mennillo. I do not remember whether I ever saw the original of that letter, a copy of which you hand me, being dated April 22, 1919, addressel to F. A. Mennillo, Los Angeles, and signed F. Romeo. I do not remember whether I was in Los Angeles at the time this letter was sent. (Marked Defendant's Exhibit "A" for Identification.)

I do not remember having received the telegram, a copy of which you hand me, dated May 23, 1919, from F. Romeo & Co., Inc., addressed to F. A. Mennillo, 226 North Los Angeles Street, Los Angeles, California. I cannot say one way or another whether this telegram was received at our office. (Telegram marked Defendant's Exhibit "B.")

The telegram you hand me dated May 24, 1919, from F. A. Mennillo, Los Angeles, to F. Romeo & Company, was sent by my office. (Telegram marked Defendant's Exhibit "C.")

My telegram, Exhibit "C," is an acknowledgment of the receipt of Exhibit "B." When I testified that

(Testimony of F. A. Mennillo.)

I did not receive any notice of rejection from Romeo & Company, I was not in error. A claim is not a rejection. I do not remember having seen the telegram, a copy of which you hand me dated June 4, 1919, from F. Romeo & Company to F. A. Mennillo, Los Angeles. (Telegram marked Defendant's Exhibit "D.") I do not remember how many cars of Greek Olives we shipped to Romeo & Company in April or May, 1919. I do not remember whether we shipped more than one car of olives. Defendant's Exhibit "D" might have been in the office, but I did not see it. My firm sent the telegram, a copy of which you hand me dated June 5, 1919, from F. A. Mennillo, Los Angeles, to F. Romeo & Company. (Telegram marked Defendant's Exhibit "E.")

I do not remember receiving the telegram, a copy of which you hand me dated June 10, 1919, from Romeo to F. A. Mennillo. (Telegram marked Defendant's Exhibit "F.") [31]

I do not remember receiving the telegram, a copy of which you hand me dated June 13, 1919, from Romeo & Company to F. A. Mennillo. (Telegram marked Defendant's Exhibit "G.")

I do not remember receiving the letter, a copy of which you hand me dated July 9, 1919, from Romeo & Company to F. A. Mennillo. (Letter marked defendant's Exhibit "H.")

The telegram, a copy of which you hand me, F. A.

(Testimony of F. A. Mennillo.)

Mennillo to F. Romeo, dated July 10, 1919, is from my office. (Telegram marked Defendant's Exhibit "I.")

The letter dated July 16, 1919, a copy of which you hand F. A. Mennillo to F. Romeo & Co. was sent by my firm. (Letter marked Defendant's Exhibit "J.")

The only contract for the sale of these olives made by me with Romeo & Company is a written contract. That contract was for shipment of olives for which recovery is sought in this suit. The contract provided for arrangements as to payment of these olives, which were letter of credit against bill of lading to be presented at any bank in California. The letter of credit was to be for the full amount. I do not remember for how much the letter of credit was, and I do not know that in this particular case the letter of credit was for less than the full amount, because I was paid in full; I do not remember having heard it was for $8,000.00. I cannot say that on or about May 2, 1919, I discounted with the Bank of Italy a draft drawn on F. Romeo & Company for $5,743.63. My office presented to the Bank two drafts covering the amounts of the shipments involved in the litigation. I do not remember the exact amount of each draft. I do not know whether the shipments were paid for by letter of credit against the bill of lading. I was paid in that way by the bank. I mean that, according to the con-

(Testimony of F. A. Mennillo.)

tract, I presented the draft and bill of lading at the bank and [32] received payment according to the amount stated in the invoice. I am not interested in knowing how those payments should be paid by F. Romeo & Co. when I have been paid according to the terms of contract. I drew the draft complying with the contract. I drew two drafts for payment of the two shipments and was paid for them. I do not remember the amount of either one. All of my drafts were drawn against the letter of credit and I received money for them. The contract calls for a letter of credit and I assume there was one for $13,743.63 when I was paid. However, I do not know this of my personal knowledge. My firm drew these drafts and I do not know whether they were signed by my brother or myself. As I drew two drafts instead of one against the letter of credit, we had two bills of lading, and it is not necessary to have only one letter of credit to cover different shipments. We did not draw the two drafts, because there were two bills of lading; it was a matter of finance. F. Romeo examined the two carloads of olives that we shipped on April 19. I examined both at Lindsay, California, and I made many trips to Lindsay from Los Angeles to inspect the olives. When I inspected them, these two carloads of olives were in Lindsay; they were loading; they were packing in cans and barrels; the Greek Style Olives were in barrels; they were pocked loose,

(Testimony of F. A. Mennillo.)

in bulk. I do not know which car of olives was shipped first, the olives in bulk or those in cans. According to the dates on the invoice you show me, the Greek olives seem to have been shipped first. The first car was shipped on April 18, 1919. I cannot say how long before that date Mr. Romeo and I saw these Greek Olives, but it must have been in the month of April. I do not know if it might have been the month of March. When Mr. Romeo saw these Greek Olives, I do not remember whether or not some of them were already in the car. Mr. Romeo saw these olives before they were put in barrels. He also saw them after they were [33] put in barrels. I cannot say what time elapsed between the time he first saw them and the second time, Mr. Romeo and I having made various trips to inspect all olives ready for shipment under the contract. We shipped other Greek Olives to Romeo, and the invoices will show the exact date of the previous shipments. Mr. Romeo inspected all of the Greek Olives not at the same time, but at different times. I did not keep track of the dates when Mr. Romeo and I went to the plant to inspect these olives. We were not shipping olives to anyone other than Romeo from that plant at the same time that his olives were being shipped. Mr. Romeo also inspected the car of ripe olives about the same time he inspected the others. We packed the ripe olives between November 15th and January 30th. They

(Testimony of F. A. Mennillo.)

were put in cans and sealed, all of the cans sealed at the same time, only the labels and cases to be provided for shipments. Mr. Romeo inspected the olives in the cans. We opened many cans while he was at the plant. After they were sealed, we opened some cans for his inspection. I cannot state when this inspection was made.

Redirect Examination.

Our contract with Romeo & Co. was signed on behalf of said Company either by the Secretary Italiano or by Mr. G. F. Romeo. I do not remember whether or not I was present when it was signed.

F. A. Mennillo & Co. was paid the full purchase price for the two shipments, the subject of this suit, by the Bank of Italy. Mr. F. Romeo examined all olives shipped under this contract at our plant in California. We have not completed the shipments under this contract, but I have tendered the delivery of all olives still to be shipped under this contract. The telgram you hand me (Defendant's Exhibit "D") covers more olives than those which are the subject of this suit. It covers different shipments than those involved herein. [34]

At no time prior to the shipment of these olives did F. Romeo object to the quality of any of the olives shipped, and F. Romeo made the customary trade inspection of all olives shipped under this contract.

(Testimony of F. A. Mennillo.)

Recross-examination.

F. Romeo inspected all of the olives we shipped.

After the olives are canned, the cans are sealed. To inspect them, the buyer orders us to open some cases of his selection from which cans are opened. The cans thus opened are thrown away. Inspection is made of so many cases per cent of the lot to be shipped. Mr. Romeo selected here and there throughout the lot, and examined certain cans. The barrels with the Greek Olives are closed tight, removable on request and the bung is always removable. The olives can be inspected and the top replaced.

An adjournment of court was taken until Monday, June 20, 1921, at ten o'clock A. M. [35]

On Monday morning, June 20, 1921, at 10:00 o'clock A. M., the trial of this case was continued and the following proceedings were had:

Testimony of C. R. Mennillo, for Plaintiff.

C. R. MENNILLO, a witness on behalf of the plaintiff, was sworn and testified as follows:

Direct Examination.

I live in Pasadena, Los Angeles County, California. I am now in the brokerage business and was in that business during the year 1919 at which time I lived at Hollywood, California. During the month of May, 1919, I was connected with the firm of F. A. Mennillo. This firm was engaged in the packing and brokerage business and dealt mostly in olives. Their

(Testimony of C. R. Mennillo.)

plants were at Lindsay, Santa Barbara, Cocoima, and Sunland. They made an office in Los Angeles. F. A. Mennillo was the sole proprietor of said firm and was the only member of it. He was doing business under the name of F. A. Mennillo. I was employed by that firm as manager and looked after the business in general, in the Los Angeles office. I did not look after the financial matters, making collections for olives that were sold, et cetera. During the month of May, 1919, I met F. Romeo. I had known him for years, for many years. I met him about the 2d of May, 1919, when I was called down to the Bank of Italy in Los Angeles by the fact that the bank had two bills of lading for some olives that were shipped to F. Romeo & Company in New York, and they had arranged with Mr. Romeo for a payment on the olives. I got word from the Bank of Italy that there was some transaction going on with reference to some olives, and I went to the Bank of Italy at Los Angeles, 7th and Broadway Branch, and there I met Mr. and Mrs. Romeo. The F. Romeo I there met is connected with the firm of F. Romeo & Company of New York. I had a conversation with Mr. F. Romeo at that time and the only subject discussed was the arrangement for the payment. The parties who took part in that conversation were James Moore, vice-president, I presume of the [36] Bank of Italy, Mr. F. Romeo, his wife and myself. They had two bills of lading and the amount was $13,743.63, and Mr. Romeo informed us that his New York concern, the amount of the

(Testimony of C. R. Mennillo.)

letter of credit opened was only $8,000, and if he could be obliged to give them a draft for the balance at sixty days. The bank seemed to be satisfied with the arrangement and the transaction was closed right there. The Bank of Italy had the bill of lading. The entire stock of F. A. Mennillo had been pledged to the Bank of Italy as collateral for a loan. There was only one draft issued. The bank was paid $8,000 cash and the balance this draft, and I was paid by one draft $8,000 in cash. The signature F. A. Mennillo by C. F. Mennillo, attorney in fact, on the draft for $5,743.63 is my signature. I signed the name of F. A. Mennillo to the draft myself and endorsed it to the Bank of Italy. I gave that draft to the Bank of Italy after signing and endorsing it. I do not know what became of the two bills of lading for the two cars of olives after I gave that draft to the Bank of Italy. I left the bank. We were given credit by the bank for $13,743.63.

The draft was then offered in evidence and marked Plaintiff's Exhibit No. 1.

The draft was then read to the jury. Draft dated May 2, 1919, drawn by F. A. Mennillo on F. Romeo & Co., Inc., payable to the order of F. A. Mennillo in the sum of $5743.63.

C. R. MENNILLO continuing to testify:

F. A. Mennillo & Company has never repaid the Bank of Italy for this money.

Cross-examination.

I know the Bank of Italy gave F. A. Mennillo

(Testimony of C. R. Mennillo.)

credit for the amount of this draft. I had the bank-book and it was entered in said book. I know also from the bank statement. I have neither the bank-book nor the bank statement with me. At that time F. A. Mennillo owed some money to the Bank of Italy but I do not know how much. Only one draft was drawn on this specific transaction. There was a letter of credit to F. Romeo & Company. They did not have to draw a draft in order to get the money on a letter of credit. The money of the letter of credit was sent as far as I know to F. Romeo for this specific deal, for these two bills of lading, to apply this money to [37] these specific bills of lading. The money was due to the Bank of Italy, because the Bank of Italy had possession of the bills of lading and the goods were in the possession of said bank. The Bank of Italy made no contract with F. Romeo & Company. That company sold no olives to the bank. F. A. Mennillo made the contract. If any money was owed for olives it was owed to F. A. Mennillo. The draft for $8,000 under the letter of credit should have been signed by somebody. If a draft was drawn for the $8,000 I do not know who drew it. I know that Mr. Romeo paid the Bank of Italy on these two bills of lading $8,000 cash and as far as I know it was a letter of credit; I don't know if he made any draft to draw this money or not. There was only one draft drawn by myself acting for F. A. Mennillo. This draft was drawn by the bank and I signed it at 10:00 o'clock in the morning on May 2, 1919. After the conversa-

(Testimony of C. R. Mennillo.)

tion before referred to, the draft was drawn and I signed it. I don't remember whether anyone on behalf of the Bank of Italy or anyone in the conversation asked Mr. Romeo to accept the draft in writing or promise to accept the draft in writing.

Testimony of James O. Moore, for Plaintiff.

JAMES O. MOORE was called on behalf of the plaintiff, was sworn and testified as follows:

Direct Examination

I live in Los Angeles, California, and am employed by the Los Angeles Trust & Savings Bank as an assistant to the president. In May, 1919, I was assistant manager of the Bank of Italy at its 7th and Broadway Branch, Los Angeles, California. While so employed I met both Mr. C. R. Mennillo and Mr. F. Romeo. I had met both these gentlemen before that time, on several occasions and in other transactions. The draft, Plaintiff's Exhibit 1, came under my notice while employed by the Bank of Italy at that time. At the Bank of Italy, Mr. Romeo, I believe, came into the office first and Mr. Mennillo followed shortly after with a bill of lading covering either [38] a car or two carloads of olives, against which the East River National Bank issued an acceptance credit up to $8,000, I believe, I am just a little vague on that, together with a draft payable on arrival of goods or at sight, which Mr. Romeo O.K.'d and accepted the bill of lading for. I refer to two drafts, one for $8,000 which was covered by the East River guaranty and the other the draft, Plain-

(Testimony of James O. Moore.)

tiff's Exhibit No. 1. At the time the draft sued on here was drawn there were present Mr. Romeo, Mr. Mennillo and, I believe, Mrs. Romeo. This draft was simply to take up the balance between the invoice and the letter of credit. Letter of credit was for $8,000, if I remember correctly; it was two years ago. This draft, Plaintiff's Exhibit 1, represents the excess of the invoice for the two cars of olives over the letter of credit. Upon the drawing of the draft, at the request of Mr. Mennillo, I handed the bills of lading to Mr. Romeo to be forwarded on to the company. If I remember correctly there was nothing further said other than the ordinary conversation that would probably transpire in any transaction of this character. I thereupon gave F. A. Mennillo & Company credit on this transaction and also on the transaction involving the acceptance. In other words, I credited his account with $8,000 and with $5,743.63. Mr. Mennillo himself brought in the bill of lading at the time these gentlemen came to the bank. To my knowledge at that time none of these goods were in pledge to the Bank of Italy. I cannot remember exactly when these cars went in pledge to the Bank of Italy; some were in pledge and some were not. Eventually all went into pledge. These, however, had been released if they had been pledged. I left the Bank of Italy on December 13, 1919, and up to that time neither F. A. Mennillo nor F. Romeo & Company had reimbursed the Bank of Italy.

(Testimony of James O. Moore.)

Cross-examination.

I cannot give the exact details of the conversation which took place during this transaction, but the bill of lading was presented and Mr. Romeo was there to accept the bill, see that the acceptance was drawn, also [39] this draft that you have reference to and nothing more was said other than that which would transpire in any other ordinary business transaction. There is nothing else I can recollect. Those present at the conversation were Mr. Lacy, my assistant at that time, Mr. Romeo and, I believe, I cannot state exactly, Mrs. Romeo and also Mr. Mennillo; *no else* to my knowledge.

Testimony of T. W. Lacy, for Plaintiff.

T. W. LACY, a witness called by the plaintiff, was sworn and testified as follows:

Direct Examination.

I live in Los Angeles, California, and am employed in the Loan Department of the Los Angeles Trust & Savings Bank. I was employed by the Bank of Italy in the month of May, 1919. I was a clerk in the Loan department at 7th & Broadway Branch. I overheard a conversation that took place in that office on the 2d of May, 1919, between Mr. James O. Moore, Mr. C. R. Mennillo, F. Romeo and his wife. As nearly as I can relate the conversation was to the effect that Mr. Mennillo requested that we deliver the bill of lading on this draft to F. Romeo & Company, which we did, and we gave R. Mennillo & Company credit for the face value of the draft. I was

(Testimony of T. W. Lacy.)

not there during the whole of the conversation. Mr. Moore called me up when part of the conversation had been completed, if I remember correctly. At that time Mr. Romeo stated that upon arrival of the goods in New York, they would accept the draft.

Cross-examination.

Mr. Mennillo requested the Bank of Italy to deliver the bill of lading covered by this draft to Mr. Romeo, which the bank did, and Mr. Romeo stated the draft would be accepted upon its presentation and arrival of the goods in New York. There were two drafts, one for $8,000 drawn under a letter of credit, issued by the East River National Bank and another for some $5,000-odd dollars, being the difference between the amount of the invoice and the amount of the letter of credit for $8,000 of the East River [40] National Bank and the one I am referring to is the one that was not covered by the letter of credit. The draft for $5,743.63 was present at the meeting and was already drawn when Mr. Romeo said that it would be accepted upon its presentation and arrival of the goods in New York. It has been so long ago that I could not state whether Mr. Moore asked Mr. Romeo to accept the draft in writing at that time or promise in writing to accept the draft. I did not, and as far as I know nobody asked Mr. Romeo to accept it in writing or promise to accept it in writing.

Plaintiff thereupon rested his case and the defendant offered the following testimony:

DEFENDANT STATES:

Testimony of Francisco Romeo, for Defendant.

FRANCISCO ROMEO, a witness called on behalf of the defendant, was duly sworn and testified as follows:

Direct Examination.

I live in New York and have known the firm of F. Romeo & Company, Inc., since the time it stated. About seven years ago I organized it. They are importers of food products and manufacturers, and the principal place of business is located at 374 Washington Street, New York City. During the year 1918 our firm made a contract with F. A. Mennillo for the purchase of [41] olives. I recognize the document you hand me. It is one of the originals of that contract of purchase and was signed by "seller, F. A. Mennillo, per somebody." The party who signed that was connected with the firm about that time. The contract was then offered in evidence as Defendants' Exhibit "A." Counsel for plaintiff objected to the admissibility of this exhibit on the ground that no foundation had been laid in that it did not appear that this contract was called to the attention of the Bank of Italy or that the Bank of Italy was in any way bound by it. The Court thereupon overruled said objection, to which ruling counsel for the plaintiff duly excepted and said exception is here designated as Exception No. 2.

Insert here copy of contract, Exhibit "A."

On May 2, 1919, I was in the Bank of Italy. I remember that date because I had business to transact

(Testimony of Francisco Romeo.)

and my wife was there with me and it was her birthday. I went there to settle for a shipment of olives with Mr. Mennillo. I had had some conversation with Mr. Mennillo before that time with regard to the matter. Mr. Cielo Mennillo, who was a witness on the stand here this morning, came to me and we had a conversation before we went to the bank, and Mr. Mennillo notified me—counsel for plaintiff here objected. "If your Honor please, we will object to any conversation that took place between this witness and Mr. Mennillo before they went to the bank, on the ground that it would not be binding on the plaintiff in this case, the Bank of Italy, it having taken place outside of its presence.

By the COURT.—"I think inasmuch as under the pleading the parties differ as to what occurred at the bank, I shall permit this to go in as an explanation bearing upon the general question as to whether or not the agreement pleaded in the complaint was made, or whether it was the agreement stated in the answer." To this ruling counsel for plaintiff duly excepted and said exception is here designated

EXCEPTION No. 3.

Mr. Mennillo notified me that on the 18th of April they shipped two cars of olives; then I told him that I would not accept that shipment [42] as they did not call it to my attention to approve the quality. Then he said to me—counsel for plaintiff here objected to the conversation on the ground that it varied the terms of a written contract already in evidence. The Court thereupon overruled the objec-

(Testimony of Francisco Romeo.)

tion, to which ruling counsel for the plaintiff duly excepted and said exception is here designated

EXCEPTION No. 4.

It was understood that all the olives before shipping should have been approved by myself and when that shipment was not examined, I objected to taking that shipment. Then he invited me to make some proposition. I offered him about fifty per cent of the invoice because the previous shipment of olives was not satisfactory in quality, and then we agreed that I was going to pay $8,000 and the balance was to be conditioned on accepting a draft in New York after the examination and approval of the quality of the olives. That conversation took place in the Clark Hotel, Los Angeles, where I was living at that time. A day or two after this conversation, to wit, on the second day of May, we went to the Bank of Italy. I know it was after because I notified my office that we agreed to accept $8,000 and I had to notify them to open a credit for that amount on these two shipments. And this they did. With the East River National Bank, New York City, my firm opened a letter of credit in favor of the Bank of Italy for $8,000. On the 2d of May, Mr. Mennillo agreed that we had to pay $8,000 on account of that shipment; if the quality of the goods after the arrival in New York and examination by my people there was satisfactory then they were to accept a draft at sixty days sight in favor of Mennillo, if the quality of the goods was satisfactory. That was the

(Testimony of Francisco Romeo.)

understanding with Mr. Mennillo at Los Angeles. We went to the bank on May 2d and there I told Mr. Moore the same arrangement that I had made with Mr. Mennillo. I told him that we were not paying the full amount of that invoice because I had not examined the quality of the goods. The amount of the invoice of those two cars was $13,743.07, I think. At the bank there was no conversation about this draft. About the middle of June I went to New York and there saw the olives that were covered by these two [43] invoices. At that time I inspected the olives and found them a very poor quality. The Greek style olives were of a very inferior quality and some of them were not even fit for human consumption. They were reddish; black olives should be black. If they are reddish, then they are considered of an inferior quality. It showed poor processing. Furthermore, they were not graded; generally, olives are graded but these olives were all mixed, poor and bad and all sizes. The black olives, the Greek style, were inferior in this that some were soft, some were reddish and they were not uniform in quality. To be soft is not a good quality; to be reddish is not a good quality. It is not proper to have sizes mixed in a barrel; if they are not properly graded it affects the quality. These olives were shipped on the 18th of April, before I had this transaction at the bank. Between the 18th of April and May 2d we had this conversation; I rejected the olives and I did not

(Testimony of Francisco Romeo.)

want to take them, because I had not inspected the quality. I had had no opportunity to inspect them before they were shipped. They were in transit when he told me he had shipped these olives and he notified me that he had made shipment without notice. After my arrival in New York I also inspected the ripe olives. I made inspection by the usual method, to wit, by opening several cans which we took from several cases. Ripe olives should be graded according to size that they specify in the can; if they are marked "standard" they should be standard; if medium they should be marked "medium"; and should not be soft. These ripe olives I found not graded and there was a great percentage that were soft and of bad taste. Canned ripe olives should be hard; they should be firm. That is the only quality that is acceptable. When soft, of course, they are not usable; they are going in a state of decomposition. During the months of May and June, 1919, the market for olives was firm; the price had not gone down but remained firm for some time; in fact during all 1919, because there was no importation from Greece. That applies also to California ripe olives, because that is a California specialty and there never has been any importation of ripe olives from Europe. [44]

Counsel for defendants then asked the following

(Testimony of Francisco Romeo.)

question: "Did you get any other instructions from them other than that?"

By Counsel for Plaintiff: "We object to that on the ground it is immaterial, irrelevant and incompetent. The witness has already testified that this transaction was authorized by the firm."

Counsel for defendants next asked: "What were the instructions that you got from your firm?"

Mr. FERRARI.—"We object to that."

The Court thereupon overruled said objection, to which ruling counsel for the plaintiff duly excepted and said exception is here designated

EXCEPTION No. 5.

The witness answered: I had instructions to pay $8,000 on that invoice, and then, of course, the sixty day sight draft to be accepted in New York after the examination and approval of the quality of the olives.

Cross-examination.

I am now and have been since the organization of F. Romeo & Company, president of that firm. The firm was incorporated in 1914. I was president of said firm on the second day of May, 1919. I was president up to and pas*sed* the second day of May, 1919, of F. Romeo & Company. I came to California the latter part of November, 1918, and remained in California until June 3, 1919. I know where Lindsay, California, is and I visited there with Mr. F. A. Mennillo and Mrs. Romeo. I went

(Testimony of Francisco Romeo.)

there to see the process of the olives because that was the first part of December. I had entered into some negotiations for the purchase of olives from F. A. Mennillo and I went up there to Lindsay to see the olives in process; the olives were in process at that date because that was the part of December. I stayed there a couple of hours; we got there late and we slept in a hotel and then the morning after we left for San Francisco. I did not make an examination of the olives that Mr. Mennillo had on hand at that time because they were all in bulk in big kegs, they were in process; I did not see them. I went there to examine the olives but I did not pick up either the black olives nor the ripe ones [45] to examine the quality and the size because they were in process and it was not complete. I looked at the process but I could not see that the quality was good or bad; I could not see because they were in the course of processing; in fact, I told him there was no use to come here this time of the year, and he said, "Well, we will come again when the goods are ready to be shipped." There were some green olives that were ready for shipment and those were accepted and paid for, a lot of green olives in barrels. I did not examine any olives that were still on the trees. As far as grade and size are concerned, I could not have told when I saw the olives in course of processing whether they were properly graded or not, because they were mixed

(Testimony of Francisco Romeo.)

together. He said they were going to select them after the processing. I did not know at that time that the selection of olives is always made prior to the processing. I do not know if that is the right way of doing, because I have never been a party to olive processing. I was not in a position to complain at that time because the process was incomplete. About the 6th of December I visited Lindsay and again four or five days later we were back in Los Angeles and stopped again for a couple of hours there. On the second trip I did not look at the olives. We only stopped very shortly. We did not stop at Lindsay to look at the olives but only to have a rest. I was in poor health at the time and it was too hard for me to make a continuous trip. I stopped at Lindsay because I was in poor health and not to look at the olives. As I remember we went to Lindsay just to salute the people and so on, and I did not look at the olives. We went to the olive plant where the olives were being processed. We were with Mr. Mennillo. They showed me the olives that were in process. After that visit I did not go to Lindsay again until June 3d; that was the day we left for New York. Prior to May 2d I made only two visits to Lindsay. I saw a lot of olives that were in process and the process was not complete, and it was out of the way to express any opinion about the quality. We did not open several cans to examine olives; they were

(Testimony of Francisco Romeo.)

in big tanks of a thousand gallons or so; I did not see any cans nor tin [46] containers. Before I went to Lindsay I did not know that these olives were in the course of process because I did not know if they were ready for shipping or not. Mr. Mennillo told me to stop and see the way the olives were processing and I did. During the conversation I had with C. R. Mennillo at the Clark Hotel, Los Angeles, Mrs. Romeo was present. Our conversation took place in the mezzanine of the Clark Hotel and the meeting was arranged by telephone. Mr. Mennillo telephoned to me that he was coming. I do not remember how long it was prior to the 2d of May because he came there several times and talked about the shipment of April 18th. At that conversation I agreed to accept this draft for $5,000 after the goods arrived in New York and proved to be satisfactory, and I agreed to pay $8,000 on the letter of credit. The $8,000 letter of credit was established as soon as we agreed that he was going to accept $8,000. It is not a fact that I had a letter of credit issued to me prior to that for a larger amount and that this $8,000 was the balance because it expired. Previous credit that I had expired because we had several other shipments before this one of April 18th, so I had no more credit in my possession and when we agreed that he was going to accept $8,000 on account of that shipment, then I wired my office to open the credit for that amount in my favor. I had a letter of credit for other shipments, but I don't remember if I used it all up;

(Testimony of Francisco Romeo.)

if I called for other credit that meant that I didn't have any more credit in my possession. It is not a fact that the old credit had a balance of $8,000 left and that that was renewed and that was the entire credit that was given me out here. I called that credit especially for that shipment. I went to the bank alone, and Mrs. Romeo came there later. Still later Mr. Mennillo arrived. I do not remember exactly that we again had the same conversation in the bank which we had previously had with Mr. Mennillo at the Clark Hotel with reference to this shipment. It was all agreed he was going to draw sixty days sight draft for the balance and my firm was to accept the draft after approval of the quality of these two cars in transit. We were to accept and pay the draft if the quality of the goods was satisfactory. [47]

Question: "Are you sure, Mr. Romeo, that anything was said in the Bank of Italy when you went there to negotiate that draft, with reference to the condition that the draft was only to be paid in the event that the goods were satisfactory?"

Answer: "There was no conversation on the subject."

Witness continuing to testify: If I am not mistaken, I think I reported to Mr. Moore the agreement. I am not positive, but Mr. Moore was satisfied to take that $8,000. Mr. Moore knew the condition because I stayed there about half an hour in the bank and we were talking about this transaction.

Q. But it is quite possible, Mr. Romeo, that you

(Testimony of Francisco Romeo.)

did not specifically make that conditional statement, namely, that the draft would only be accepted in case the goods met with your approval, in the bank?

A. That was understood; Mr. Moore knew that.

Q. You say he knew that. You had never talked to Moore about it?

A. Well, I stayed there about half an hour in the bank, and we were talking about this transaction.

Q. But you have no independent recollection of making that statement to Mr. Moore, that you say was made in the conversation between you and Mr. Mennillo?

A. Well, if I had promised to accept it on that condition, I would *except* that I would.

Q. That is not an answer to the question. You are not positive, as you have just stated?

A. I think we had the conversation, otherwise Mr. Moore would not have accepted the draft.

I am not a banker; my son is a director of the East River National Bank of New York City. We have some stock in the East River. I have never acted as a director of the East River National Bank, but I was a director of some bank years ago.

The firm of Romeo & Company has a good reputation; a reputation for selling nothing but goods that are perfectly satisfactory in all respects. We hope to keep up that reputation. After the olives arrived in New York they were examined by me and by other members of our firm. I did not leave them at the railroad station. They were in our store. They were there at the time they were ex-

(Testimony of Francisco Romeo.)

amined; that was the understanding. We never redelivered them to the [48] railroad station; we offered them to Mr. Mennillo if we got our money back; we held the olives subject to his orders. The correspondence will show that. There ought to be correspondence showing that we advised Mr. Mennillo that we held the olives subject to his order. We sold these olives because he insisted that the olives were good quality and before they were a total loss we thought it better to sell them the best we could. I do not know that we sold all these olives; my office takes care of the business as I am not active in the firm. As my office is in charge of the sale I cannot say whether or not these olives were sold to customers who came there and themselves sampled the olives and after sampling purchased them. I did not exactly understand that the Bank of Italy had advanced some money on this transaction; at one time Mr. Mennillo told me that the Bank of Italy was doing a favor for him. If the Bank of Italy was discounting, I did not know they were discounting the draft. It was distinctly understood that I was paying $8,000 and that we intended to assume no more obligation on that shipment until the goods were examined in New York. I do not know if it was Mr. Moore or Mr. Mennillo who gave me the bill of lading as we were sitting there. I do not know if it was the Bank of Italy or Menillo. If it was stated at that time that the Bank of Italy was to finance this shipment, by advancing on that draft the difference between the

(Testimony of Francisco Romeo.)

entire purchase price and the $8,000, I did not know anything about it; but I would not say that such a statement had not been made. I went to the Bank of Italy because it is the correspondent of the East River National Bank, which latter bank opened a credit of $8,000 in my favor. I had a letter of credit running to me personally, an unconditional letter of credit in my favor for merchandise. I could have drawn a draft against that and given it to whoever I pleased, but it is not regular. It is not a fact that having only $8,000 to pay for these goods and the goods calling for $13,000 odd, that I went to the Bank of Italy because I knew that in some way or other the Bank of Italy was going to assist in financing this transaction, and put up the balance of the money. I first knew that the Bank of Italy held this draft [49] when it reached New York. I do not remember seeing this draft in the Bank of Italy on May 2d. I did not see that draft drawn on Romeo & Company and delivered by Mr. Mennillo to Mr. Moore before I received the bill of lading for these goods. I did not see it. I knew that Mennillo was going to draw that draft, but I didn't know when, whether he was drawing that day or after thirty days. But I did know that this draft was going to be drawn by Mennillo against the firm of Romeo & Company and that the Bank of Italy was going to have something to do with the financing of that transaction. I first knew that the Bank of Italy was interested in that draft when it was presented in New York. I do not know if I was in

(Testimony of Francisco Romeo.)

New York at the time the draft was presented; and I do not know if anything was said that the draft was presented by the Bank of Italy and not by Mennillo. I left California on June 3d, and when I arrived in New York about the middle of June the goods were already in my store. I suppose the draft had been presented by that date, but I do not remember. When I was in San Francisco in March, 1920, Mr. Fickett called my attention to the draft, and asked me how about it. I was surprised that the Bank of Italy was talking about this transaction. I said, "Well, you might authorize your correspondent in New York to find out what has become of these olives, because they were so poor that we are meeting with very heavy losses." I did not know that the Bank of Italy was interested. My offices reported to Mr. Mennillo that they wanted to give the olives back and Mr. Mennillo insisted that the olives were of good quality. We wanted to submit an account for the sale of these olives to the Bank of Italy and they did not want to accept that. We never did submit any account to the Bank of Italy for the sale of these olives. We had nothing to do with the Bank of Italy; we notified Mennillo that we kept the goods subject to his order, and unless he gave disposition we were going to sell for his account. I do not remember being present at any time that sales were made of these olives to any of the trade in New York. The market for olives was firm in 1919 for the months following May. It is not a fact [50] that the market for California olives

(Testimony of Francisco Romeo.)

was very seriously affected by the declaration of the Armistice and that the price of California olives steadily declined because no olives came during 1919. It is not a fact that the market fell by reason of the declaration of the Armistice and in anticipation of the arrival of olives, the Greek olives, because there were no importations and good stock was in very good demand. The main object of my trip out here was for my health; I was in very poor health at that date, and I was also here for the purpose of examining those olives and attending to these shipments made by Mennillo. I kept constantly in touch with my office with reference to conditions here, relying mostly all the time on Mr. Mennillo's statements. I kept in touch with my office as to the different moves that I made. Everything I did out here I reported to my office. I act always in consultation with my office, because they are posted; I am not posted on the market conditions because I am not active in business. My office disapproved the way I handled the previous shipment, the one of April 19th, because the quality was very poor. My firm told me I only had authority to agree to accept a draft in a conditional way. I reported everything that transpired with reference to this particular shipment made by Mennillo and which was paid for by that draft of $8,000 on May 2d; I reported all this to my office and there was no disapproval of what I had done. The goods were taken to our warehouse. We have all bills of lading in our business. I did not have this bill of lading

(Testimony of Francisco Romeo.)

provide for an inspection of goods at the railroad station instead of at my place of business because the bill of lading was drawn that way and they communicated this back to me after the shipment was made. I did not ask to have the bill of lading provide for an inspection at the railroad station; it was not necessary. [51]

Redirect Examination.

The report you show me, a letter, is the report made on May 2, 1919, after the transaction at the bank. It was written for me by Mrs. Romeo to my firm in New York. Counsel for defendant thereupon offered said letter in evidence and counsel for plaintiff objected to it on the ground that it was a self-serving declaration. The Court overruled the objection, to which ruling counsel for plaintiff duly excepted and said *acc*eption is here designated as

EXCEPTION NUMBER 7.

(Letter marked Defendant's Exhibit "B.")

The telegram you show me addressed to F. Romeo & Co., Inc., dated April 29, 1919, signed by F. Romeo, is the telegram where we agree to pay that money ($8,000.00). It is the telegram I sent to my firm to tell them what my understanding was of what I had arranged. I sent this telegram. Whereupon counsel for defendant offered in evidence the said telegram to which counsel for plaintiff objected. The Court overruled said objection, to which rule counsel for plaintiff duly excepted and said exception is here designated as

EXCEPTION NUMBER 8.

(Testimony of Francisco Romeo.)

(Telegram marked Defendant's Exhibit "C.")

I used the phrase "not being examined," with which this telegram starts off, because they notified me after the goods were shipped, not being examined, the quality of the olives that they shipped to my firm without my authority or my knowledge. The quality of the olives that had been shipped had not been examined because the quality should have been approved by me. [52]

The COURT.—I think, gentlemen of the jury, I should say to you relative to these two documents, that is, this letter and this telegram, they are admitted in evidence not for the purpose of showing what the agreement was; you will have to get that from the sworn testimony here and the other exhibits. But inasmuch as counsel for the plaintiff asked whether the firm disapproved of anything this witness reported, I am permitting these two instruments to go in for the purpose of advising you what his reports were to his firm in New York, and merely for that purpose.

The two trips to Lindsay, to which I testified, during the month of December, were in the year 1918 and the shipments were made in May, 1919. I traveled from Los Angeles to Lindsay by automobile and from [53] Lindsay to San Francisco still by automobile. We stayed in San Francisco for four days at the Palace Hotel, I think. We returned to Lindsay by automobile, so we stopped at Lindsay on the way back. We stayed there just

(Testimony of Francisco Romeo.)

for a rest because I did not want to go all the way direct; it was too much for one trip.

While we were at the Bank of Italy, Mr. Mennillo said we had to draw on my firm for the balance of the invoice at 60 days' sight. The draft was to be accepted after examination and approval of the quality of the olives—that was said in Mr. Moore's presence. I received the bills of lading covering these two carloads, at the bank. I got them from Mr. Mennillo. The letter of credit which I drew for $8,000.00 was a telegraphic letter of credit addressed to F. Romeo, through the Bank of Italy. I am sure it was not addressed to any other bank in Los Angeles. All the letters of credit were going through the Bank of Italy. Of course, if the letter of credit came through any other bank, then we would go to the bank that sent the notice of the letter of credit; that is etiquette. The Bank of Italy had notice that there was a credit and naturally the operation was consummated in that bank. It is not a very good thing to go elsewhere.

Recross-examination.

When I said in my letter to the firm "the understanding is that after you examine the goods of the two cars in transit, you have to accept 60 days' sight note for the amount of $5,743.63, which will be presented to you by the East River National Bank," I knew that said bank would present it because it was transacting all of the business of the Bank of Italy in New York. We never thought that the Bank of Italy was the one to collect the money. We

(Testimony of Francisco Romeo.)

were dealing with Mr. Mennillo, and he was going to collect the balance if the olives were of satisfactory quality. I knew that [54] the East River National Bank is the correspondent of the Bank of Italy, but not that it was interested. My dealings were with Mr. Mennillo, and Mr. Mennillo was the one who sold the goods to me and I intended to pay Mr. Mennillo if the quality of the goods was approved. It was quite natural to me to see that the East River National Bank was going to present that draft.

Further Recross-examination.

I met Mr. Mennillo at the Bank of Italy on May 2, 1919. I knew that he was banking with the Bank of Italy. I bought other shipments of olives from Mr. Mennillo, but they were all discounted by letter of credit. My firm opened a letter in my favor. I could not tell you with what bank in New York. They finally opened a credit with a different bank. When the credit with the bank was exhausted, they opened a credit with another bank.

Testimony of W. O. Johnson, for Defendant.

W. O. JOHNSON, a witness called on behalf of the defendant, was sworn and testified as follows:

Direct Examination.

I reside at Hollywood, California, and my place of business is Lindsay, California. I was in business at the latter place during the fall of 1918 and the spring of 1919, and was connected with Mr. Mennillo. I had charge of the shipping and packing

(Testimony of W. O. Johnson.)

of Mr. Mennillo's olive business throughout California. I am familiar with the two shipments of olives that were made on the 18th of April, 1918, and the 23d of April, 1919, the first of Greek Olives, and the second of Ripe Olives. They were shipped to the order of F. A. Mennillo, notify F. Romeo, N. Y. They were shipped in cars P. M. 41322 on the 18th of April, and Penna. 60237 [55] on the 23d of April. The one car is Greek and the other canned goods.

What you show me are the copies of the bills of lading.

Whereupon counsel for defendant offered in evidence the copies of the bills of lading. Counsel for plaintiff objected on the ground that they are immaterial, irrelevant and incompetent in so far as the Bank of Italy is concerned. Whereupon the Court overruled said objection to which ruling counsel for plaintiff duly *accepted* and said exception is here designated as

EXCEPTION NUMBER 9.

Bills of lading were marked Defendant's Exhibits "D" and "E," which are here to be inserted. Counsel for defendant then asked, "Was there a carload of olives shipped from Lindsay on May 9th to F. Romeo & Co. by F. A. Mennillo?" Counsel for plaintiff thereupon objected to said question on the ground that what may have happened on May 9th is absolutely immaterial, irrelevant and in-

(Testimony of W. O. Johnson.)

competent and not within the issues of this case. The Court thereupon overruled said objection to which ruling counsel for plaintiff duly accepted and said exception is here designated as

EXCEPTION NUMBER 10.

Continuing his testimony: There was a carload of olives shipped from Lindsay on May 9th, to Romeo & Company by F. A. Mennillo. The copy you hand me is a certified copy of the bill of lading under which that shipment was made. (Certified copy marked Defendant's Exhibit "F," which is to be here inserted.) I was in Lindsay during the months of March and April, 1919, and I never saw Mr. Romeo at Lindsay during that period. The processing of the olives that were shipped under these three bills of lading began in December and ended some time in April or May—about the 10th of April. As to the quality—they were what we call "seconds"; they were ungraded. As to the Greek Style Black [56] olives, they were what we call "tailings," the last end of the house. That means the cleaning up of the odds and ends and culls, and things of that kind. I knew that these were to be shipped to F. Romeo & Company under this contract. I did not say anything to Mr. Mennillo about shipping them, but sent samples of these to him in Los Angeles. The state of the market for California Greek Style Olives, during April, May and June of 1919 was fine. Up to Christmas,

(Testimony of W. O. Johnson.)

all of the year of 1919 was good. The market for California Ripe Olives was just as good; it was firm during all that year and until about February of 1920. The ripe olives covered by the bills of lading, canned olives, were ungraded. In this car in question the olives were mixed; medium were put into small, because the standards were running too many to the pound; they were running about 160, and we added a lot of standards to bring them down to 120; we understood that is what the contract called for. I have been in the olive business about 19 years and am familiar with the grading and processing of olives. During those years I have *keep* in touch with the market situation in regard to olives as well as in regard to the manufacture and processing of them. The Greek Style Olive is cured in dry salt and is black. It is black, that is, tree ripe when it is started to be cured and then it turns red and then turns black again. It must be absolutely ripe on the tree before you begin to cure it. About ten or twelve days after they start processing, the olive turns red and they turn black again about four or five days later.

Counsel for defendant then asked: "If when olives are supposed to be ready to ship, when they are received by a purchaser they are reddish yellow, are they in good condition?" A. "No."

Mr. FERRARI.—"We object to that."

(Testimony of W. O. Johnson.)

The COURT.—"There is evidence that these olives were yellow?"

Mr. GORRELL.—"Yes, there is in this deposition."

The COURT.—"Answer the question."

A. "No."

Counsel for plaintiff duly excepted and said exception is here designated as

EXCEPTION NUMBER 11. [57]

If Greek Style Black Olives are received and are not black, they are not in good condition; they have been trying to make them of unripe fruit. You cannot make a California Greek Style Black Olive of unripe fruit. If you tried to do this, it would be hard and green and you could not get as good a price for it. The California canned, or ripe olive goes through a process of lye to extract the bitterness, what they call the "tannin," and then it is preserved in salt and put in cans and hermetically sealed. California Ripe Olives are produced in California and some in Arizona, but nowhere else in this country. No canned olives are imported from abroad. When taken from the can, the California canned olive should be in color anywhere from a seal brown to a black, and should be firm; if it is soft, it is poorly packed, not properly graded. I was present at Lindsay when Mr. Mennillo came with Mr. and Mrs. Romeo in December, 1918, and I saw them there at that time. I also saw them the

(Testimony of W. O. Johnson.)

second time they came back from San Francisco. They were looking at olives in bins or tanks. By examining the olives in December, when Mr. Romeo was there, nobody could tell what the condition of the olives would be when they were through with the processing. Olives are graded with reference to size either when they first come into the house or after they are cured, generally when they first come in. Many times they come in so fast they cannot grade them all at that time; we have to wait until we pack them to grade them.

Cross-examination.

I left the employ of Mr. Mennillo I believe about March or April of 1920. I have nothing against Mr. Mennillo; I am just as friendly to him as I am to anybody. As far as I personally am concerned, I am on friendly terms with Mr. Mennillo. I have had letters from him, and very pleasant letters, since I left Mr. Mennillo's service, but I have none of these letters with me; I [58] tear them up. The olives mature and are ready for packing anywhere from November to May; they were picked as late as May this year. The time is from the first of November until probably the 15th of February. The last of the olives that were shipped in May in the instant case came in the early part of January. It would be difficult to say what proportion came in in the early part of January because we

(Testimony of W. O. Johnson.)

were shipping olives to other concerns as they were cured, pickled and canned. The olives that were finally shipped in May were in the establishment in Lindsay as early as December. We had a very small plant there and could only can about 1,000 or 1,200 gallons a day and we had to hold them sometimes two or three weeks to make a car. Some of the olives that were actually shipped in April, 1919, had been in the establishment in the state of processing as early as December, 918, but not all of them; I could not tell what proportion of them. I was not foreman of the plant; I had charge of the office and had charge of the business of the firm. I had a processor there by the name of Daniels and we had a superintendent, a Mr. Boyce. I supervised the general work of the plant and all other plants of Mr. Mennillo. I stayed at Lindsay during all the packing because the crop was short in other parts of the State and it was not necessary that I go elsewhere; I probably left there two or three times during the season for two or three days. This particular shipment was not graded; none of the standard or medium olives were graded at any time. The condition in which they were during the processing was not necessarily the condition in which they were shipped. We took out some of the best of them and made up cars and shipped them; the balance we shipped to Mr. Romeo. Mr. Boyce did this at Mr. Mennillo's instructions. I was su-

(Testimony of W. O. Johnson.)

pervising the plant and objected to it very strenuously. I notified Mr. F. A. Mennillo and his brother, Mr. C. R. Mennillo, but I did not notify Romeo & Co. [59] I never saw Mr. Romeo there to examine any olives, although I saw him at the plant. I could not tell, at that time, whether or not the olives complied with the contract; they were in the course of processing, and no man can tell at that time. When you pick the olive off the tree, I do not think you can tell whether it is a good olive or bad one, or whether or not it is going to process; I have never been able to tell. When you begin processing, you can tell what the result is going to be with proper treatment. These olives, unfortunately, did not get proper treatment; I was supervising them and it was my business to see that they did get proper treatment. I saw Mr. Romeo at the plant on two occasions; I accompanied Mr. Mennillo and Mr. Romeo through the plant; what there was to see. I do not know whether I showed him the olives. I showed him the whole plant and he must have seen everything that was in the plant; I did not cover up the olives. I was with them from the time they came into the office, while they went through the plant, and until they went back into the office. That was on the first trip. On the second occasion, Mr. Romeo did not go into the plant; he did not go out of the office. The only conversation I had with Mr. Romeo or his

(Testimony of W. O. Johnson.)

attorneys about my testimony in this case was about the bills of lading; they asked me if I could get copies at Lindsay and I told them that I thought I could. We said nothing else. I did not know what was going to be asked me when I came on this stand any more that I know what you are going to ask me. I have never discussed these matters with Mr. Romeo or his attorneys. I am associated with the American Olive Company. I am associated with the Lindsay Ripe Olive Company, a firm of olive growers. They are not successors to Mr. Mennillo; they use the same plant; I am interested in the profits of the firm. [60]

Redirect Examination.

When I said "the reason the process was not properly done was as follows," I had a process of my own that I had used for fifteen years; that is why I went with Mr. Mennillo—for the curing of the olives, and then I had a process that I had gotten from Greece for Greek Olives and I had shown this to Mr. Mennillo and it was on the grounds of these two processes that I left the American Olive Company and went with him. After I had gotten started, he had five houses and five processes, and every man wanted to use the process that they used previously, and I had a contract with Mr. Mennillo, and I just simply sat there, and did all I could do, and waited until the contract terminated. The olives at Lindsay were not processed the way I wanted them.

Testimony of T. E. Foster, for Defendant.

Mr. T. E. FOSTER, a witness called on behalf of the defendant, was sworn and testified as follows:

Direct Examination.

I reside at San Francisco, and I have been managing an olive plant. I have been engaged in the purchase and sale of olives for about five years and have been familiar with the price of olives. In May and June of 1919 the olive market was fairly good; the olive market did not weaken during these months to the best of my recollection. The market for Greek Style Black Olives during that year was the best it has ever been and remained that way until the following year; the market during the year 1919 Cailfornia Black Olives in cans, ripe olives, was very good, remained good until the bottleanos scare, the poison scare, occurred, if I remember correctly, in October, 1919. Until that time the condition of the olive market for California Ripe Olives in cans was strong. The California Greek Style Olives are [61] generally packed in barrels. When packed for shipment they should be all black; they should resemble the appearance of dried prunes. If reddish or yellow, they would be considered off quality. You are supposed to get the top price for ripe olives. California Ripe Olives, when canned, should be black and of a firm texture; if off, they are not considered

(Testimony of T. E. Foster.)

high quality olives. As to how much salt there should be in the barrels of California Greek Style Black Olives, that is a matter of opinion; some pack them without salt and some pack them with salt. The salt does not really hurt the olives, except that whoever buys them pays extra freight on them; the olives are generally weighed into the barrel, net weight, and then salt added afterwards. Whether or not a man is paying for something he did not get when he buys black olives, California Greek Style Black Olives, and finds a lot of salt in the bottom of the barrel, all depends upon whether or not the sale is based on the net weight of the olives. I was packing olives myself until September, 1919. During the years 1918 and 1919, the concern I represent here on the coast had prices ranging from around 21¢ to 28¢ per pound. That was anywhere from January until May, 1919. I am also familiar with the contracts later in the year 1919. The firm I represent had a contract for olives in which they agreed to purchase all the olives from the Olive Growers' Association at the price of $135.00 per ton, and we resold them in September, 1919, for $15.00 a ton advance.

Cross-examination.

I am connected with the Pacific Coast Mercantile Company, and have been with them since August, 1918. They lease a plant. I have nothing to do

(Testimony of T. E. Foster.)

with the actual processing, except that everything is done under instructions from the office. I have no list or anything else in the office which would show what the market was during May and June, 1919, because they are all back [62] in the Head Office in Boston. I have not looked at these lists recently. It was generally known at that time, everybody knew, that these months were supposed to be the best months as to price of California Olives. At that time there was a publication showing the market price of these olives, but I have none of those lists with me, nor have I consulted any of those lists before giving this testimony.

Redirect Examination.

I gave my testimony from being familiar with conditions. May and June, 1919, were not particularly the best months in the olive industry, but during those months, all during the spring, and up till around May, the market was considered very firm. I have no recollection of the market beginning to drop in May. In September we sold the Greek product for $15.00 a ton, and this would be indicative of the conditions of the market. The packers could not pay more money for the olives unless the market would permit it; that would indicate that the market was stronger.

Recross-examination

The market during the summer months of 1919

(Testimony of T. E. Foster.)

was one of the best markets California has ever had. This high mark extended anywhere from December, 1918, to May, 1919. I do not say any particular date; it might have been June, but those were the best months. After that it did not taper off to any degree. I did not include the other months in stating the best period of the market because after June, July and August it is generally open season; there is nothing doing because the new crop does not come in until October and November —they are practically the slack months of the year. Those were the best months as to market conditions and though it continued good until September and October, that is the new crop. [63]

Testimony of Mrs. Marie J. Romeo, for Defendants.

Mrs. M. J. ROMEO, a witness called on behalf of the defendants, was duly sworn and testified as follows:

Direct Examination.

I live in New York City. I was in Los Angeles during the fall of 1918 and winter of 1919, and accompanied my husband wherever he went during that time; I always do on account of his poor health. I am the wife of the defendant, F. Romeo. I accompanied Mr. Romeo and Mr. Mennillo on the automobile trip to Lindsay in December, 1918. We went to the olive plant; then to San Francisco, by automobile and then back to Los Angeles. On no

(Testimony of Mrs. Marie J. Romeo.)

other occasion was I ever at the Lindsay plant with Mr. Romeo. I went to other plants of Mr. Mennillo with Mr. Romeo, but never to Lindsay plant again except in December, 1918. During the months of April and May, 1919, I was with Mr. Romeo in Los Angeles. I was present at all conversations between Mr. Romeo and Mr. Mennillo in April, 1919, with reference to the draft. A conversation took place at the Clark Hotel, Los Angeles, concerning which the defendant put the question: "What was the conversation as well as you can remember?" Counsel for plaintiff thereupon objected to said question. The Court thereupon overruled said objection, whereupon counsel for plaintiff duly excepted, and said exception is here designated as

EXCEPTION NUMBER 12.

I usually listen to arrangements made between my husband and his business friends, although I seldom take part in the conversation; I just listen. I am not a very good business woman. I heard Mr. Mennillo say that he had shipped the cars and Mr. Romeo said that he had not examined the goods; that he could not pay in full as he did with the other shipments because the other shipments did not prove satisfactory, and he offered 50% of this [64] shipment. Mr. Mennillo said that that would be all right and Mr. Romeo said that he would not give him more than 50%; after some discussion they came to an agreement that Mr. Romeo would

(Testimony of Mrs. Marie J. Romeo.)

pay 60% of the invoice and the bill would be paid by Mr. Mennillo; that the firm would pay Mr. Mennillo the balance in New York after approval and examination of the goods. The $8,000.00 was to be paid by the Bankers Commercial Letter of Credit to be opened in the name of my husband. The balance was to be a 60 day sight draft, to be accepted at the New York office after examination and approval of the goods. I was at the Bank of Italy on the 2d day of May, 1919. I fixed that date because it was my birthday and my husband brought me a bouquet of red roses. I could not say that I heard the conversation that there took place. I knew what I was there for and I very likely heard it because I am not deaf altogether, but I do not remember positively. I guess I sat about this distance (indicating) from Mr. Moore's desk; I could not say that I paid particular attention to the conversation; it is hard to tell what was said, I don't know. I did not know I was going to be put in this chair to report it and I did not pay any particular attention; I knew what we went there for. I had been at the bank several times previously with Mr. Romeo and on each occasion it was for the transaction of the same kind of business—the taking up of letters of credit for other shipments of different kinds of goods.

Deposition of Giovanni F. Romeo, for Defendant.

GIOVANNI F. ROMEO, a witness called on behalf of the defendant, having been first duly sworn before the Commissioner, testified in his deposition as follows:

I live at No. 125 Prospect Park, West, Brook*ly*, New York. I am a Director and Vice-President of the defendant F. Romeo & Co., [65] and have been connected with them for sixteen years; their business is importing, wholesale, jobbing and manufacturing of food products. During that entire period we have handled olives. We handled California Olives during 1917, I believe, but surely during the period of 1919 and 1920. During the 16 years with this firm, I have been everything from office boy up. In the beginning I did lots of small jobs about the office and later on my position grew to be more responsible and I bought goods and sold them. I have been buying and selling olives practically during the whole period. I have also sampled and examined them. Mr. Francis Romeo is my father; he has been in the olive business for thirty-seven years. I gained my knowledge of the olive business from my father and from being in constant touch and association with people in that line. I could not say offhand how many olives our Company handled on an average during the years 1910 to 1919. As I remember it, we always handled them in large quantities, at least anywhere from

(Deposition of Giovanni F. Romeo.)

500 barrels in the beginning; as it grew, we handled larger quantities. We handled Greek, Black and Ripe Olives. Cicily Green Olives and California Greek Style Olives. The California Greek Style Olives are black ripe olives cured in the Greek style; that is, they are pickled after the olives are ripe and cured and packed in brine. There is very little difference between the Greek Style Olive and the Greek Olive. It is practically merely a question of where they are grown. The California Ripe Olive is not packed in brine; it is simply packed in water and cured differently. Generally they are packed, for the Italian trade, in water; in cans of one gallon, commonly known as Number 12 cans, and sealed; they are packed one-half dozen to the case. The Greek Style Olives are generaly packed in barrels 200 to 300 pounds, not in brine; only a slight quantity of brine. These barrels can be opened without [66] injury to the olives. When the cans of ripe olives are opened, the olives will keep for three or four weeks if covered with water; they can be resealed without damage to the olives, but I believe it will be necessary to use a new can. I remember a shipment of Greek Style Olives from Mr. F. A. Mennillo shipped on April 18, 1919, arriving in New York subsequent to that date. They arrived in New York about May 21st. Defendant's Exhibit "K" is a copy of the invoices under which these olives arrived. I remember a shipment of a carload

(Deposition of Giovanni F. Romeo.)

of ripe olives from Mr. F. A. Mennillo shipped April 23, 1919, which arrived in New York sometime subsequent to that date. They arrived the same date as the carload of Greek Olives. Defendant's Exhibit "L" is a copy of the invoice under which this carload was shipped. I learned of the arrival of these olives as soon as they were in the store; that is, within a day or so after they arrived in New York. I examined the Greek Style Olives the same date they were brought to our store. Mr. Italiano and, I believe, Mr. Longo, were with me when I examined these olives. I went down stairs; had them open about eight or ten barrels which had not been previously opened, and examined the quality. I put my hand into the barrels, drew out the olives and looked at them carefully. I also looked at all the barrels that had been opened, that is about eight or ten. I tasted the olives from all of these barrels. Some tasted very salty, others had a bad taste owing to their being so soft. I found also that the olives were ungraded, that is, different sizes of olives were in the same barrel, small and medium were mixed. Defendant's Exhibit "K" calls for Standard and Medium Olives. "Standard" is the same as small. Having these two grades of olives mixed in the same barrel lowers the price which one can obtain for them. Besides being ungraded, I [67] found that these olives were soft, reddish in color, and generally of a poor

(Deposition of Giovanni F. Romeo.)

quality; they were packed in an excessive quantity of salt. Greek Style Olives should be black; a reddish color indicates that the olives have not been properly cured and that they were probably taken from the ground instead of being picked from the tree. The effect of these facts upon the sale of the olive is this: the trade knows that a reddish olive is generally soft, and naturally they have to be sold at a lower price. Greek Style Olives in good condition are firm. There was an excessive quantity of salt in the barrel. I put my hand in the barrel and could have taken out a handful of salt in almost any part of the barrel, with very few olives in it—salt alone or salt with very few olives in it. The olives I took out of the barrels had salt all around them. Prior to this shipment, I had examined at least a dozen other shipments of Greek Style Olives. In all the other cases there was just enough salt to properly preserve the olives. Instead of coarse ice-cream salt, a finer salt is used and this disappears within a short time when there is a regular quantity put in. On other occasions there has been no residue left after the removal of the olives—nothing but a small quantity of brine. In the barrels shipped under Defendant's Exhibit "K," there was an excessive quantity of brine, it varied. Some barrels contained one gallon, some barrels contained as high as four gallons. There was nothing else as to the condition of these olives

(Deposition of Giovanni F. Romeo.)

covered by Exhibit "K." I made the customary trade inspection of the Greek Style Olives. On the same day I also examined the shipment of ripe olives covered by Defendant's Exhibit "L." I had the store man take one can from half a dozen different cases, bring them upstairs to the office, and I opened the cans and examined the olives. I examined [68] the olives in each of these half dozen cans. Then I took a handful of olives and pressed them gently together to see how far they would resist pressure, and noted that there were a number of soft ones and also discolored olives in the cans. I handled a good number of olives in each can separately to see how firm or how soft each one was, and found that there was quite a large percentage of soft ones in each can as well as discolored ones. I also tasted them. The taste of the soft olive was good; it was different from that of the olives which were firm. Prior to this occasion, I had examined and inspected at least fifteen or twenty other shipments of California ripe olives. I made the customary trade inspection of these ripe olives. California Ripe Olives, in good condition, should be black, firm and the water should be clear. In the olives shipped under Defendant's Exhibit "L," the water was not clear; it was brownish in color. I again examined the Greek Style Olives at different intervals when I showed them to customers or brokers. On these other

(Deposition of Giovanni F. Romeo.)

occasions I found the same condition upon examination. I made other examinations of the ripe olives than the one to which I have just testified. These I made in showing them to brokers or customers and I found the condition to be the same upon each examination. The Greek Style Olives were not of good quality and condition and were unfit for human consumption. The ripe olives in the shipment covered by Defendant's Exhibit "L" were not of good quality and condition, and were not fit for human consumption. The Greek Style Olives under Exhibit "K" were not marketable as olives of good quality and condition. The ripe olives under Exhibit "L" were not marketable as olives of good quality and condition. The condition of the Greek Style Olives decreased their market value and they had to be sold at a lower price. The condition of the ripe [69] olives decreased their market value; I have no facts at hand showing the amount of this decrease. I remember another shipment of ripe olives from Mr. Mennillo shipped by him on or about May 9, 1919, to Romeo & Company. Defendant's Exhibit "N" for identification is an invoice covering that shipment. That carload arrived during the early part of June, I believe. I made an examination of that carload upon arrival and found the olives to be in the same condition as the previous car of ripe olives. The olives covered by Exhibits "N" and "L" are

(Deposition of Giovanni F. Romeo.)

the same size and style of olives. After arrival, the carload of ripe olives covered by Defendant's Exhibit "L" was set aside, that is they were placed in one corner of the warehouse and orders were given that they were not to be sold until instructions from the office. The same was done with the olives shipped under Exhibit "N." By that I mean that they were set aside and orders were given that they be not sold until instructions were issued to that effect, and they were so set aside. The olives under Exhibits "L" and "N" were commingled and there were no identifying marks whereby we could subsequently tell the olives of one shipment from those of another. These olives were subsequently sold and we kept a separate account of these two lots; it would have been very difficult to keep these two accounts separate because of the limited space in the store. In selling the ripe olives, we could not tell whether they were from Exhibit "L" or Exhibit "N." Some time in August or September, I cannot say exactly, one day I happened to be at the East River National Bank and there saw the original draft as set out in paragraph five of this complaint. I had no previous knowledge that the East River National Bank held this draft. I first learned that they had it when Mr. Lodato told me that the Bank [70] had presented for acceptance and had refused to accept this draft as we had previously agreed to do. I

(Deposition of Giovanni F. Romeo.)

cannot say exactly when this was, but it was after the receipt of the two carloads of olives—Exhibits "K" and "L." I was not present at the time this draft was presented for acceptance. Francis Romeo, the president of the company, was in California. Mr. Lodato, Mr. Italiano and I were at the firm's office. We always discuss matters of importance together before taking any action. There were seven directors of the firm, I believe, including Mr. Pica, Mr. Dassari and Mrs. Romeo. At that time Mr. Dassaro was an engineer with the New York Telephone Company. Mr. Pica was in the office part of the time and on the road the remainder of the time. I cannot say positively that there was a meeting of a quorum, that is four of the directors, at any time to take up the question of acceptance or nonacceptance of this draft. However, Mr. Lodato, Mr. Italiano and I, after examining the olives upon arrival, decided that owing to their bad condition we would not accept the draft drawn by Mr. Mennillo for the balance. I was in charge of the New York office during the absence of the President in California. We have never been paid any part of the damage suffered by reason of the fact that the olives covered by Exhibits "K" and "L" were not up to standard. I am acquainted with the contract made between Mr. Mennillo and our company calling for the shipment of certain olives during the year 1919, but I do not

(Deposition of Giovanni F. Romeo.)

remember what that contract provided for as to the condition and quantity of the olives to be shipped under it.

An adjournment of court was then taken until Tuesday, June 21st, 1921, at ten o'clock A. M. [71]

On Tuesday morning, June 21st, 1921, at ten o'clock A. M., the trial of this case was continued and the following proceedings were had:

Counsel for plaintiff thereupon introduced the following testimony from the cross-examination of the deposition of G. F. Romeo, taken on behalf of the defendant, wherein said witness testified as follows:

Cross-examination.

My duties with F. Romeo & Company are the general management of the business, buying goods, selling them and financing them. I examine all goods purchased by Romeo & Company. I do not remember how many carloads of Greek or ripe olives were purchased by Romeo & Company in 1919.

Francis Romeo is my father. He is President of F. Romeo & Company. In the fall of 1918 and the winter of 1919 he was in California for his health, and for his health alone. While there he transacted no business for Romeo & Company. While he was in California we consulted with him at different times about matters of business for F.

(Deposition of Giovanni F. Romeo.)

Romeo & Company in New York and in California. Francis Romeo examined goods purchased by Romeo & Company in California for said company. He cashed a letter of credit issued in his name by Romeo & Company, and I presume he paid the proceeds to Mennillo.

Francis Romeo arranged the draft referred to in the fifth paragraph of the complaint in this suit. While in California, Francis Romeo did whatever he was instructed to do by the New York office, following the consultations above referred to.

I remember a contract executed between Romeo & Company and Mennillo & Company for the shipment of olives during 1918 and 1919. I do not recollect who signed or executed that contract on behalf of Romeo & Company. The contract is in California, I imagine. I do not know if two people signed that contract for our firm. I am a Director of F. Romeo & Company. The olives purchased under the contract were to be inspected in California by our [72] representative. We chose as that representative, Mr. Francis Romeo, who is now in California.

The olives covered by invoices, Defendant's Exhibits "K" and "L" arrived in New York on, or about, May 21st, 1919. I remember the date from the records, that is from the date we paid the freight and the date of the arrival notice. May 21st is

(Deposition of Giovanni F. Romeo.)

the approximate date of the arrival of the olives at the railroad station. I fixed the date of the arrival of the olives at our store, or warehouse, because I know we withdrew them as soon as they arrived. I remember this. The olives were first examined by me on the date they were withdrawn from the pier. I opened eight (8) or ten (10) barrels of Greek olives not previously opened by Mr. Italiano and Mr. Lodato. They opened and examined some barrels in the store before I did. When I came to the office on the day of the arrival of these olives and was informed that they had arrived, I immediately examined them. I could not say what time of the day; it was the afternoon I imagine. Mr. Lodato and Mr. Italiano had opened some barrels before I arrived at the store.

I do not remember whether or not the Board of Directors of Romeo & Company by resolution authorized Mr. Lodato to refuse to accept the draft set forth in paragraph fifth of the complaint. Our firm keeps a record of the drafts which we accept when presented for payment. We keep no record of the drafts we reject. I understand that the olives for which the letter of credit for Eight Thousand ($8,000) Dollars was issued, and the draft for Five Thousand Seven Hundred Forty-three Dollars and Sixty-three ($5,743.63) Cents was drawn, are the olives referred to in Defendant's Exhibits "K" and "L." My first knowledge that

(Deposition of Giovanni F. Romeo.)

this draft had been presented to Romeo & Company for payment was after the olives had arrived. I could not say definitely how long after; it was quite some time. I first saw the draft in August or September, 1919. I was in charge of the affairs of Romeo & Company while Francis Romeo was in California. The draft may have been presented to the firm while I was not there.

We had agreed that it was not to be accepted; we, meaning [73] all of us in New York, together with Mr. Romeo in California; all of us in New York, that is, Mr. Lodato, Mr. Italiano, myself and Mr. Francis Romeo.

As to the authority of the three parties mentioned to decide not to honor the draft: we were in full charge of the business and took the step after due consultation between ourselves and Mr. Romeo in California.

I do not remember what quantity of olives were to be purchased by Romeo & Company from Mennillo & Company under this contract. The olives covered by invoices, Defendant's Exhibits "K" and "L" were a modification of this contract. That modification was made by Francis Romeo. He was conducting the business for Romeo & Company in California during 1918 and 1919, after consultation with us. He conducted this business only upon our authority to do so. He conducted only such business as he was authorized to do. I do not re-

(Deposition of Giovanni F. Romeo.)

member whether Romeo & Company authorized Francis Romeo to conduct business for them in California during 1918 and 1919, that is, I do not know whether there had been any official ruling by the Board of Directors to that effect. I believe we had some correspondence to the effect that Romeo & Company issued a letter of credit to Francis Romeo, its President, in California, for Eight Thousand ($8,000) Dollars, in part payment of the olives covered by invoices, Defendant's Exhibits "K" and "L," and that Francis Romeo arranged with Mennillo & Company, at the request of Romeo & Company, the draft set forth in plaintiff's complaint under paragraph fifth. If Mr. Romeo arranged for the draft set forth in paragraph fifth of plaintiff's complaint and made the modifications of which I speak, he was authorized so to do by Romeo & Co.

Francis Romeo was authorized to transact some business for Romeo & Company in California in 1918 and 1919. The contract already existed when he made the modifications of which I speak. It was not a separate agreement of purchase.

I believe there is a letter from Mr. Romeo to Mr. Mennillo, showing the modifications. I believe this letter is on the Coast, but possibly it is here. The letter you hand me is the one to which I refer. [74] Part of the modification is therein laid out; the balance of the modification is constituted by

(Deposition of Giovanni F. Romeo.)

the final terms as agreed, which were that we were to advance an Eight Thousand ($8,000) Dollar letter of credit, and that the balance would be paid by a draft at sixty days sight, drawn by Mennillo & Company on us to be accepted by us after having examined and approved the quality.

Besides Exhibit "A," we have our application to the East River National Bank for Eight Thousand ($8,000) Dollars to show the balance of the modification. A contract was executed between Romeo & Company and Mennillo & Company and I claim that a modification was made of that contract; I submit a letter, Defendant's Exhibit "A" to show part of the arrangement for the modification. Our various wires and correspondence with Mennillo & Company protesting the olives, after they had arrived, and had been examined by us, further tend to show that modification. From the letters and telegrams marked Exhibits "A" to "V" a modification of that contract between our firm and Mennillo is shown in Exhibit "A"—a letter of Francis Romeo to F. A. Mennillo, dated April 22d, 1919; Exhibit "B," telegram from F. Romeo & Co. to F. A. Mennillo, dated May 23d; Exhibit "D," telegram from Romeo & Company to Mennillo & Company, dated June 4th; Exhibit "G," telegram from Romeo & Company to F. A. Mennillo, dated June 13th; Exhibit "H," letter from Romeo & Company to Mennillo & Company, dated July 9th; Exhibit

(Deposition of Giovanni F. Romeo.)

"M," telegram from Romeo & Company to Mennillo & Company, dated July 9th; Exhibit "O," copy of letter of credit, drawn in favor of F. Romeo, dated April 29th, for Eight Thousand ($8,000) Dollars; Exhibit "P," telegram from F. Romeo in Los Angeles, to F. Romeo & Co. in New York, and Exhibit "Q," telegram from F. Romeo & Company to F. Romeo, dated April 29th.

The above exhibits, I claim, show a modification of the agreement, or contract, between Mennillo & Company and F. Romeo & Company.

Exhibit "E" convinces me my understanding of the modification. It reads as follows: "Los Angeles, California, June 5th, 1919, to F. Romeo & Company, New York. Careful consideration of your telegram and careful examination of samples, duplicate of goods sent you, convinces me my [75] standing as per my letter of May 29th absolute correct. Signed F. A. Mennillo."

Besides Defendant's Exhibit "C," showing a modification of this contract, we have his signature on the draft. There may be some other writing in California showing an agreement by Mennillo & Company to modify this contract, but I know of none in New York.

The olives I referred to as tasting very salty were the olives in the barrel. The condition of the Greek olives may have been due to the fact that they were taken from the ground instead of being picked from

(Deposition of Giovanni F. Romeo.)

the tree, or again, that they had been picked when over-ripe.

The customary trade inspection of Greek olives is from 5 to 10 per cent; it is not definite.

The olives shipped under invoices, Defendant's Exhibits "K" and "L," were withdrawn from the railroad station because we did not reject them until after such withdrawal. They were withdrawn for the purpose of inspection. While remaining in our possession, these olives were shown to the customers and to brokers in the trade for the purpose of selling them. For examination, the store man withdrew one can, each, of six different cases. 1043 cases of ripe olives were shipped under this invoice; 5 per cent of that would be 50. In this instance, we made the customary trade inspection because there were also a large number of cans that had been opened the same day by Mr. Italiano and Mr. Lodato. These were on the sample table and I examined them. I examined six (6) cans of the ones that I had opened, and in addition to that, I also saw the olives in the cans that had been opened by Mr. Lodato.

I believe Romeo & Company bought other olives during the year 1919 besides those mentioned in this contract. I do not remember how many carloads. I have no idea what quantity of olives were bought during 1919. Those bought by our firm were stored in our warehouse at 374 Washington Street, New York. That is where our offices are situated.

I do not remember whether Mennillo's olives,

(Deposition of Giovanni F. Romeo.)

both ripe and [76] Greek, were the only olives in our warehouse in May 1919. I was present when the store man went thru the cans.

During the sixteen years I have been connected with Romeo & Company, I have examined ripe olives for the purpose of purchasing them, at least, 15 or 20 times. It may be more, but not less. I examine all goods purchased by Romeo & Company.

Romeo & Company have bought, at least, 15 or 20 consignments of ripe olives in the past 16 years. We bought maybe 30 or 40 more.

If I remember correctly, the second examination was made of the Greek style and ripe olives the next day. I examined both kinds at least a dozen times when they were in the possession of our firm. These examinations were made at various dates after their arrival, approximately, May, June, July, August, probably September, and maybe after that. That is as far as my memory goes.

The draft was presented to Mr. Lodato. I cannot recollect the date. I do not believe Romeo & Company have any record of it. We refused to accept the draft because the olives were not as contracted for.

I before stated that while Francis Romeo was in California, he was authorized to transact just such business as Romeo & Company specified. Generally, when Mr. Romeo was authorized to do anything, it was after a consultation held previously between Mr. Italiano, Mr. Lodato and myself. Francis Romeo, the president of Romeo & Company, only

(Deposition of Giovanni F. Romeo.)

transacted such business as I, as Vice-president, and Mr. Lodato as Secretary and Treasurer, consulted and agreed upon, because this was the office and place of business. Mr. Lodato and I are giving the business our direction and attention and are in constant touch with the matters and, therefore, are naturally fully acquainted with things pertaining to the business and are in a better position to judge as to what decisions to make. Mr. Romeo always consulted with us before taking any important steps, as we are directing the business here.

The by-laws state that Mr. Francis Romeo cannot sign any draft acceptances, or any documents, without the additional signatures of [77] either myself or Mr. Lodato. The by-laws state definitely what he is allowed to do.

We generally consult together when a deal of importance is involved before purchasing the goods.

In a sub-section of the By-laws, Article 3, Officers, Section 4 of Subdivision "F," it is laid out that the president shall "make and sign all contracts and agreements and see that they are properly carried out."

Under subdivision "F," Francis Romeo can make and sign all contracts and agreements and see that they are properly carried out. I do not know if this means contracts for the purchase and sale of goods. Romeo & Company is engaged in no other business than the importation and manufacture and sale of food stuffs and other food products.

I am a director of Romeo & Company and I have

(Deposition of Giovanni F. Romeo.)

read the By-laws. I do not know whether sub-section "F" refers particularly to goods or not, but I imagine it does.

When Mr. Lodato and I refused to accept the draft set forth in this complaint, we were directed so to do by the Board of Directors of Romeo & Company, but not in writing. It was not at a regular meeting of the Board of Directors. In saying we were directed by the Board of Directors, I mean that Mr. Lodato, Mr. Italiano and myself consulted together regarding the matter; we consulted with Francis Romeo on the Coast regarding it and came to the conclusion that we should not accept the draft because of the bad quality of the goods covered in part by it.

The face amount of the draft set forth in paragraph fifth of plaintiff's complaint does not represent the balance due for the goods shipped under invoices, Defendant's Exhibits "K" and "L." The total agreed purchase price under these two exhibits was $13,743.63. Eight Thousand ($8,000) Dollars was paid by letter of credit on account. The $5,743.-63, face value of the draft, represents the amount we were to pay, providing, we found the quality satisfactory. [78]

The olives arrived in New York before the draft was presented to our firm for acceptance. The draft in question was presented before maturity.

We did not return to Menillo & Company the olives covered by Defendant's Exhibits "K" and "L." We

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held them subject to his order, as per our telegrams and correspondence. We have no letter or telegram in New York from Mennillo stating that he would agree to our holding them for his order. Any such letter or telegram would be in California.

The olives were withdrawn from the warehouse on, or about, the 22d day of May, 1919. We forwarded notice of rejection to Mennillo & Company, by telegram' the day we examined the olives. On May 23d we notified him of the condition of the olives; May 25th we received his answer, Exhibit "C," stating that his brother would call on us, and on June 4th, Exhibit "D," we rejected the olives and asked disposition of them. The first notice of rejection was the telegram, Defendant's Exhibit "B." The olives referred to by Defendant's Exhibits "K" and "L" remained in the possession of Romeo & Co. until the day of their sale by Romeo & Company.

I believe Francis Romeo will remain in California for the trial of this action.

The olives shipped under Defendant's Exhibit "K" and "L" were not of the same general quality as the olives previously accepted by Romeo & Company in shipments from Mennillo & Company. The market for olives were strong from May 1st, 1919, to January 1st, 1920; no Greek olives were coming. The market decreased for neither Greek style nor ripe olives.

Redirect Examination.

The paper I have here contains the minutes of the

(Deposition of Giovanni F. Romeo.)

Special Meeting of the Board of Directors of F. Romeo & Company, Incorporated, held February 9th, 1917. They are kept in the regular Minute Book of the Company. They then are read into the records.

The following minutes from the meeting of February 9th, 1917, pages 74 and 75: [79]

"Mr. Fred F. Romeo makes a motion that all the officers for the time just expired, be confirmed for this year. Mr. Francesco Romeo says that he appreciates the motion of Mr. Fred F. Romeo and is thankful for it, but he cannot accept the office of president; first on account of his poor health, he is unable to comply with the duties, and for the welfare of the company he deems it advisable to elect Giovanni F. Romeo to the presidency.

"Mr. Giovanni F. Romeo is grateful to Mr. Francis Romeo for the honor the latter would confer on him, but he emphatically declares that, under no circumstances, would he accept the office of president. He appreciates the reasons expressed by Mr. Francis Romeo but he avers that even without taking an active part in the management of the business, the name of Mr. Francis Romeo as president is in itself a great factor in the welfare of our company. On the other hand, he adds, that in order to induce Mr. Francis Romeo to accept the office of president he promises that if re-elected vice-president he will continue to take charge of the general management of the business.

(Deposition of Giovanni F. Romeo.)

"All directors insisting that Mr. Francis Romeo accept the office of president, he states that he will accept, if elected, provided, that the active work connected with the duties of his office be performed by the vice-president."

I have here the minutes of the special meeting of the Board of Directors, held July 23d, 1917, which read as follows:

"The following resolution was unanimously adopted: resolved that a meeting of three (3) officers of this company, the vice-president, the secretary and assistant treasurer, be held twice a week on Tuesdays and Fridays in order to discuss all current important business matters, and that no purchase of an amount over One Thousand ($1,000) Dollars be made unless approved by a majority at one of said meetings. Records of said meetings to be kept in a separate book. This resolution to be in force from August 7th, next."

I have not the special book here referred to. I believe Mr. Italiano did keep such a book somewhere; it may be in the office. I do not [80] remember if there is any record in said book of the draft here in question; there may be.

From August 7th, 1917, the resolution I have just read was in full force, and has never since been rescinded by the Board of Directors.

I wish to correct a statement made this morning that the draft in the suit here represents the balance due on the shipment under Defendant's Exhibits

(Deposition of Giovanni F. Romeo.)

"K" and "L." I wish to state that it was a balance due, provided, the olives arrived in a satisfactory condition.

When I said the draft was presented before maturity, I meant it was presented for acceptance, and of course it could not be due until it was accepted, as it was a 60-day sight draft.

It was here stipulated between Herbert D. Cohen and John Glynn, the attorneys for the respective parties in the taking of the deposition, that the minute book of Romeo & Company contained no authorization, or direction, with reference to the refusal of acceptance, or the acceptance of the draft set forth in paragraph fifth of the Plaintiff's Complaint.

At this point it was stipulated between counsel for plaintiff and for the defendant herein, that the portions of the deposition of Mr. Lodato not read are substantially the same as those of Mr. Romeo that have just been put in evidence.

Counsel for defendant thereupon introduced and offered in evidence the following exhibits: A letter from Francis Romeo to F. A. Mennillo, dated Los Angeles, California, April 22d, 1919, marked Defendant's Exhibit "A"—for identification; a telegram from F. Romeo & Company to F. A. Mennillo, dated Los Angeles, May 23d, 1919, marked Defendant's Exhibit "B"—for identification; a telegram from F. A. Mennillo to F. Romeo & Co., dated Los Angeles, California, May 24, 1919, marked Defendant's Exhibit "C"—for identification; telegram from F. Romeo & Company to F. A. Mennillo, dated June

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4th, 1919, marked Defendant's Exhibit "D"—for identification; a telegram from F. A. Mennillo to F. Romeo & Company, dated Los Angeles, California, June 5th, 1919, marked Defendant's Exhibit "E"—for identification; telegram from F. Romeo & Company [81] to F. A. Mennillo, dated June 10, 1919, marked Defendant's Exhibit "F"—for identification; telegram from F. Romeo & Company to F. A. Mennillo, dated June 13, 1919, marked Defendant's Exhibit "G"—for identification; telegram from Romeo & Company to Mennillo & Company, dated July 9th, 1919, marked Defendant's Exhibit "H"—for identification; telegram to F. Romeo & Company from Mr. Mennillo, dated July 10th, marked Defendant's Exhibit "I"—for identification; a letter from Mennillo & Company to Romeo & Company, dated July 16th, 1919.

Counsel for defendant thereupon read into the record the following abstract from the By-laws of F. Romeo & Company, pages 18–19, section 6, relative to the duties of the Treasurer:

"The Treasurer shall (b): He shall, with either the president, vice-president, or assistant treasurer, sign all checks, notes, drafts and bills of exchange that it may be necessary and proper to draw or execute in the conduct of the company's business."

Reading from section 7: "He shall with either the president, vice-president, or treasurer, sign all checks, notes, drafts or bills of exchange that it may be necessary and proper to draw or execute in the conduct of the company's business."

(Deposition of Giovanni F. Romeo.)

Counsel for the respective parties then stipulated that the substance of the depositions of Antonio Cipolla, Morris Levenkind and Salvatore Lango, is to the effect that they purchased olives from F. Romeo & Company.

Counsel for plaintiff then continued: "I desire only one sentence of the deposition of Morris Levenkind—that he purchased these olives from F. Romeo & Company as first class olives, A–1 olives,—that question and answer; this is the answer: I will read it.

Q. State what you found as to the condition of those olives?

By the COURT.—What olives?

Mr. FERRARI (Counsel for Plaintiff).—The olives from Romeo & Company.

By the COURT.—What did he buy?

Mr. FERRARI.—He bought certain ripe olives; let me see, he bought certain ripe olives from F. Romeo & Company and the testimony shows that they were [82] from this shipment, or the shipment of the three (3) cars combined, and the answer is this—

By the COURT.—I do not think the answer will be very helpful unless we have the entire deposition on the subject.

Mr. FERRARI.—Well, I think I can read that page.

By the COURT.—He is a witness called for the defendant?

Mr. FERRARI.—Yes, and this is his direct examination.

Deposition of Morris Levenkind, Called for Defendant.

The following excerpts from said deposition were then read into the record by counsel for plaintiff:

Direct Examination.

Q. Mr. Levenkind, what is your address?

A. 104 Moore Street, New York City,

Q. What is your business?

A. Importing of food products.

Q. Have you handled olives? A. Yes.

Q. How many years have you handled olives?

A. Seven or eight years.

Q. Did you during the year 1920 do any business with F. Romeo & Co., Inc.? A. I did.

Q. Did you buy from them any ripe olives?

A. I did.

Q. Of the style known as Lindsay brand?

A. I did.

Q. About what time in 1920, do you know?

A. In May.

Q. State what you found as to the condition of these olives.

By the COURT.—In May, 1920?

Mr. FERRARI.—Yes, your Honor. [83]

The COURT.—That is a year after this transaction.

Mr. FERRARI.—Yes, but the testimony given shows that they are the same olives.

Continuing the Deposition.

A. We bought the olives to be No. 1 goods, and

(Deposition of Morris Levenkind.)

after we took them in the house and shipped them to our customers, we started to get complaints. We soon started to investigate and found that the complaints were in order, as the olives were found to be soft, mushy and unfit for human consumption.

Q. Did you, yourself, make any examination of the olives? A. I did.

Q. What did you do in making the examination?

A. When some of the olives were returned from the customers, I personally cut some of the cans to see for myself if they were really bad and I found them to be really bad.

Q. How many cans did you yourself open and examine of the olives. A. Possibly a dozen.

Q. About how long was this after you had purchased the olives from Romeo & Company?

A. Perhaps three weeks.

Q. Now, will you state just what you found in the olives when you opened the dozen cans—well, about how long a period of time had you been buying ripe olives of this same general style?

A. Six or seven years.

By Mr. GORRILL, Counsel for the Defendant.—Go back to the middle of the page 6.

Mr. FERRARI.—All right.

A. I found the olives soft, mushy and unfit for human consumption, in my opinion.

Q. In what way were they unfit for human consumption?

(Deposition of Morris Levenkind.)

A. They were deteriorated to such an extent that you couldn't bite them.

Q. Had you ever purchased ripe olives prior to this purchase from [84] Romeo & Company?

A. I did.

Q. Over how long a period of time had you been buying ripe olives of this same general style?

A. Six or seven years.

Q. State whether or not the olives which you purchased at this time from Romeo & Company, to which you testified, were or were not sound olives and in good condition?

A. They were not sound and not in good condition.

Cross-examination.

Q. Are you in business for yourself? A. Yes.

Q. What is the name of the firm?

A. Romeo Importing Company.

.Q What is their business?

A. Importing of food products.

Q. Do you specialize on any particular food products? A. The general line.

Q. What quantity of olives have you handled every year? A. During the year?

Q. During any year; you have testified you have been handling them for seven or eight years.

A. I can't say just the exact amount, but I should think a couple of thousand cases a year.

Q. Ripe olives? A. Ripe olives.

(Deposition of Morris Levenkind.)

Q. When did you buy these olives, the ripe olives from Romeo & Company? A. During May, 1920.

Q. Did you examine the olives when you bought them? A. No. [85]

Q. You bought the olives without examination?

A. Yes.

Q. What quantity of olives did you buy from Romeo & Company? A. One hundred cases.

Q. What disposition have you made of the one hundred cases of olives? A. We sold them.

Q. To your trade?

A. To our trade, and then part of them were returned.

Q. What is the customary trade inspection of olives? A. As to what?

Q. Of olives?

A. The customary inspection of olives?

Q. Yes. A. Cut a can open.

Q. What percentage of the goods bought do you examine? A. Sometimes only one can.

Q. Do you know whether or not there is a customary trade inspection in purchasing olives?

A. Generally is.

Q. Can you say what percentage of the cans are opened in that inspection?

A. I think, if a couple of cases are opened, it would be guide enough to feel that the balance of the lot would be satisfactory.

Q. When you testified you bought one hundred cases

(Deposition of Morris Levenkind.)

of olives from Romeo & Company without examination and shipped them to your trade as A No. 1 olives? A. I did.

Q. They were returned to you about three weeks later?

A. Some of them were returned about three weeks later.

Q. And that was the first examination you made of them? [86] A. Right.

Q. And you discovered they were not up to the quality you bought? A. Yes.

Q. Can you state whether the market price of ripe olives increased or decreased from May, 1919, to January, 1920?

A. I really don't remember without reference to records.

Q. Would you be in a position to answer that question when you come in to sign your testimony to-morrow? A. By looking up my bills, I would.

Q. All right, sir.

After the completion of the reading of the deposition of Morris Levenkind, the following transpired:

Mr. FERRARI, Attorney for Plaintiff.—That is all, your Honor.

Mr. GORRILL, Attorney for Defendant.—But on the next day, on the original here, he evidently added something: Q. Can you now state whether the market price of ripe olives increased or de-

(Deposition of Morris Levenkind.)

creased from May, 1919, to January, 1920?

A. Yes. The market price remained about the same.

The COURT.—Now, I understand that the other two depositions—

Mr. FERRARI.—We will stipulate that the other two depositions are under—are along the same line, and the same substance and effect as the depositions just read.

Mr. GORRILL.—I understand that we will stipulate that the evidence,—the depositions will show, that on the three cars, namely, the two cars that were involved in this draft, and on the third car of May 9th, that on the three cars, there is a loss of $4,091.24, made up as follows: The advance on the first two cars was $8,000; the advance on the third car of May 9th, $5,934.22. The net proceeds of the car of Greek olives was $2,222.41. The net proceeds on the other two cars, the ripe olives car, was $7,210.57, making a total net proceeds of $9,432.98. The total advance of $15,131.84, less $1,607.62.

Mr. FERRARI.—It is stipulated that the deposition of Mr. Lodato would show that. [87]

Mr. GORRILL.—Yes, a net loss of—

Mr. FERRARI.—$4,091.24.

Mr. GORRILL.—Now, if the Court please, for the purpose of the record, is it your understanding, Mr. Ferrari, that the depositions are in or not in, or just that stipulated fact?

(Deposition of Morris Levenkind.)

Mr. FERRARI.—If any of the jurors desire to see them—

The COURT.—I really have in mind future proceedings as to what your record will show.

Mr. FERRARI.—I would stipulate that the depositions could be considered as having been presented.

Mr. GORRILL.—That is satisfactory. That will be the depositions as read, and the deposition of Mr. Lodato.

Mr. FERRARI.—Is that your case? You might, for the purpose of the record, state or name the depositions that are considered read. Mr. Lodato's, it is stipulated that it is the same as Mr. Giovanni Romeo's. And then the deposition of Salvatore Longo, Michael Grasso and M. D. Galanos will be in substance and effect the same as the deposition of Morris Levenkind.

Mr. GORRILL.—And there is also the deposition of Cipollo.

Mr. FERRARI.—That will be to the same effect, will it not?

Mr. GORRILL.—So stipulated; yes.

The COURT.—On the point that the olives were not marketable.

Mr. GORRILL.—And they may be considered as having been read for the purpose of the record and handed to the jury if the jury desires to see them.

Mr. FERRARI.—That is stipulated.

Mr. GORRILL.—That is the defendant's case.

PLAINTIFF'S REBUTTAL.

Mr. FERRARI.—Now, in rebuttal, I desire to read to the jury the back of the contract. I reserved that right:

"TERMS AND CONDITIONS.

Conditions. If the seller should be unable to perform all of his obligations under this contract, by reason of a strike, fire, flood, or other unavoidable casualties beyond his or the control of the packer, such obligations shall terminate and cease. [88]

In case of damage to crops, or for any cause, or causes, whatsoever, the seller is unable to make full delivery of any of the varieties of goods named, the buyer agrees to accept *pro rata* delivery on all goods consigned short.

Goods to be shipped on dates described on the front part of this contract.

Goods are at risk of buyer from and after shipment. No allowance made for loss during transportation—carrier's receipt being vouchers that the goods are received in good order, this contract to be binding upon the seller must be confirmed in writing by F. A. Mennillo, who, however, shall not be responsible for the performance thereof, unless a copy properly signed by the buyer is delivered to the seller within ten days from the date hereof."

Now, may we proceed to argument, your Honor?

The COURT.—Yes.

Mr. FERRARI.—That is the case for the plaintiff.

Mr. GORRILL.—There are one or two motions that we desire to make. Will your Honor hear them in the presence of the jury?

The COURT.—Yes, I believe so.

Mr. GORRILL.—There was the motion to strike out the testimony of Mr. Lacey, on the ground that it is not within the allegations of the complaint, or within the issues in the case. We also renew the motion for the nonsuit.

The COURT.—I think I shall deny that motion and instruct the jury as to what the issues are.

Mr. GORRILL.—And we will make the motion for a directed verdict in such case.

The COURT.—Denied, and you may have an exception.

Mr. GORRILL.—May we give our grounds for the motion to make the record straight?

The COURT.—If you think it is necessary.

Mr. FERRARI.—We stipulate the same grounds.

Mr. GORRILL.—Well, here are the grounds for the directed verdict: First, that the action is upon an acceptance, and there is no evidence whatever of a written acceptance or of a promise to accept in writing, as required by the [89] provisions of the Civil Code of California.

Second: That if the action is not upon an acceptance, but upon some other sort of contract, the contract also has not been approved, first, be-

cause the promise alleged is a promise to pay, whereas the only promise approved, if any, was a promise to accept; second, it is neither alleged or proved that the or any promise was made to the plaintiff or for defendant's benefit, or, if made to a third person, was transferred by such third person to the plaintiff.

Third: Because it is not proved that the consideration alleged moved to the plaintiff or to any other person at plaintiff's request.

Fourth: It is not proved that there was any consideration for the promise alleged.

Fifth: It is not proved that the promise alleged was made by the defendant for Romeo & Company, Inc., or by anyone with defendant's authority or knowledge, or was ever ratified by this defendant. Also that the action is upon an agreement to accept an instrument—not yet at the time of the promise, in existence. That such promise was not in writing.

As an additional ground for the motion, we make the point that there is neither allegation or proof of any evidence or circumstance that would raise an estoppel upon the defendant to deny acceptance, and promise to accept, or a promise to pay, nor any allegation or proof of any reliance by the plaintiff upon any promise of the defendant, or of any giving of value to the plaintiff by the defendant, or any other change of position by the plaintiff in reliance upon any promise of the defendant.

The COURT.—This motion will be denied. I

will have to say to you gentlemen that the denial of this motion is not to be taken by you as implying what I would do if I were a juror. My function is quite different from what you will perform, and ultimately you will decide the issues on the instructions I give you. I am simply going to submit the issues to you for your determination.

(Statement to the jury by Mr. Ferrari.) [90]

Mr. GORRILL.—You would prefer that I go on, your Honor?

Mr. FERRARI.—It is a hot day. Perhaps it had better go over until two o'clock.

The COURT.—All right, we will adjourn until two o'clock.

(Thereupon a recess was taken until 2 P. M. same day.)

AFTERNOON SESSION.

The CLERK.—The attorneys have prepared a copy of that draft. They searched this noon, but couldn't find the original.

The COURT.—Let it show in the record that this is a copy. You may proceed.

(Thereupon Mr. Gorrill made his argument to the jury, and upon the conclusion of that, Mr. Ferrari made a closing statement.)

Court's Charge to the Jury.

The COURT.—"Gentlemen of the jury, as is true of most of the states in the Union, there is a law in California providing, that to be valid, ac-

ceptance of a draft, such a draft as is involved in this case, must be in writing, signed by the party to be charged. Admittedly here, there is no such writing. To escape the operation or effect of the statute, the plaintiff pleads that the defendant, through its president, F. Romeo, and for the defendant's use and benefit, induced the plaintiff to advance money, that is, to discount or pay the draft at the time it was drawn, by promising orally that it would—pay the draft in full at maturity if the bank would so advance the money, and that being so induced by the defendant, the plaintiff did discount the draft, which it would not have done had it not been for the inducements held out by the president of the defendant. That is the plaintiff's position.

The defendant disputes this contention, and claims that the only agreement was to the effect that it would pay the balance on a contract for the purchase of olives only in case the olives were, upon arrival in New York found upon investigation and inspection, to be up to the standards called for by the contract.

Your first inquiry, therefore, is whether the parties did make, or the defendant did make the absolute promise claimed by the plaintiff, and [91] for the valuable consideration pleaded. Upon that point, the burden is upon the plaintiff to establish its claim by a preponderance of the evidence, that is, evidence which produces conviction in your

minds, not necessarily beyond a reasonable doubt, or by the greater number of witnesses, but by the great weight of the evidence taken as a whole. While you may possibly find that the testimony of no witness, either for the plaintiff or the defendant, is very positive upon just what was said at the bank, that is as to the details of the conversation that took place there, taken altogether, the testimony on the point, such as it is, presents a measure of conflict. Therefore, in order to assist you in determining on which side the truth lies, I have permitted the evidence to take a pretty wide range, thus giving you the situation of the parties, and the circumstances surrounding the transaction which took place at the bank.

Of course, you will also use your reason and the common sense which we all acquire by practical experience and dealings with our fellow men. If the plaintiff was going to pay out over five thousand dollars on this draft, and if as a condition to doing that, it was requiring the defendant to make an absolutely unconditional promise to pay, you may properly ask whether it is or is not probable that it would have taken an oral promise; or would it have required a written acceptance? In balancing the probabilities and improbabilities on this point, you may consider the admitted fact that at the very time the defendant's president was present at the bank, and according to the plaintiff's evidence, was authorized to enter into a formal writ-

ten acceptance: and further,—if you believe the plaintiff's testimony—that the draft was there, made out, and of course it could have been endorsed was a written acceptance forthwith and without very much trouble. You may also bear in mind the nature of the plaintiff's business and the fact that not only the Statutes of California, but of most states, require acceptances to be in writing, and in the light of this and other circumstances in evidence, say whether the defendants did agree absolutely and unconditionally to pay the amount of the draft. [92]

"And I may add, in this connection, that as a circumstance bearing upon the main question as to just what agreement, if any, was had in the bank, you may not improperly consider just what the plaintiff actually parted with. As I have already explained, the plea is that it was induced by Mr. Romeo to part with a large amount of money, practically five thousand dollars. The evidence as to just how far it changed its position on May 2d, and as to what occurred there is not very specific. The witnesses speak of crediting F. A. Mennillo & Company, but whether or not the bank actually paid out $5,000, or any other amount, is not definitely shown. If you believe the plaintiff's testimony, it appears that Mennillo & Company was indebted to the bank, and according to the testimony of some of them, it held some of this product, this product, as collateral security, and furthermore

that F. A. Mennillo & Company was a depositor, and it may be important to you to inquire, as bearing upon the general question, as to whether or not the plaintiff bank was in any worse position after the transaction was over with than it was before, whether it paid out any money, or whether it simply credited Mennillo & Company upon the indebtedness due to it, or whether it took the draft for collection in the ordinary way when such paper is deposited by a depositor, crediting his account, with the understanding that if not collected, the account shall then be debited. In that connection, it is proper to call your attention to the fact that the draft bears an endorsement of guaranty by Mennillo & Company." [93]

"If you find that the evidence preponderates in favor of the plaintiff upon this issue, then you should award it the amount of the draft with interest thereon at seven per cent from the maturity of the draft. Am I right as to your legal rate?

Mr. FERRARI.—Yes, seven per cent.

The COURT.—If, on the other hand, you do not find such preponderance in favor of the plaintiff, then you are to find against it in this branch of the case, and consider the view pleaded by the defendants, that is a promise to pay the residue of the contract price as shown by the draft, only when and in case the olives were found to be as called for by the contract, upon their inspection on arrival in New York.

Now, speaking of that branch of the case, the

defendant was bound to accept the olives only if they were up to contract standards. If you find that the understanding was, as testified by Mr. Romeo on the stand, that is, that the olives were to be received in New York and inspected, and the draft to be paid only in case they were found to be up to contract standard, then it was the duty of the defendant upon the arrival of the olives and their receipt in New York to inspect them without unusual delay, and upon inspection, if they found them to be defective, promptly to notify the shipper, F. A. Mennillo & Company.

You have heard the evidence upon what occurred upon the arrival of the olives. Most of it, I think, was in the form of telegram and letters passing between the two parties to the contract. Retention of the shipment for [94] an unreasonable time, without objection or complaint, may be construed as an acceptance at law. But if the purchaser promptly notifies a shipper, he is not bound to return the shipment. So here, if you find that Romeo & Company promptly notified Mennillo & Company of defects in the olives, and of course, if you further find that the olives were not up to contract standard, then it was not the duty of Romeo at New York, either to return the olives to the carrier, that is to the railroad company, or to abandon them. If, as the evidence tends to show, it advised Mennillo & Company of its claim that the olives were defective and not up to contract, and if they were not up to contract, and if defendant further advised that the olives were held subject to the shipper's orders, and

if thereupon Mennillo & Company remained silent or failed to direct what should be done with the olives, the defendant had the right, and it was its duty, to retain the olives and to dispose of them at such prices as were practicable in order to diminish the loss. That is, they were under obligation to make as much of a salvage as possible. There is no contention, as I understand, that the defendant failed in this respect, that is, failed to sell at such prices as were obtainable, or that anything now remains due from the defendant to Mennillo & Company on account of the moneys thus received for the olives. Hence, if upon this branch of the case, unless you find that the olives were up to contract standards, or that notwithstanding their defects, the defendant accepted them and waived the defects, your verdict must be for the defendant." [95]

"I need hardly say to you gentlemen that you are the sole judges of the issues of fact in this case, under the instructions that I have given you, and the responsibility being upon you to find the facts, it is also your right to judge of the credibility of the witnesses and the weight to be given to their testimony. Those matters are exclusively within your province. On the other hand, you should take the principles of law for your guidance as I have explained them to you. As I say, you are the exclusive judges of the issues of fact, and the responsibility is upon you alone, and that notwithstanding any opinion that I may entertain, or you may infer I entertain as to who should succeed in this case. I do not intend to relieve you of your responsibility,

and you are the sole judges of the issues of fact and of the credibility of any and all of the witnesses.

As I have already explained to you, by declination to dismiss the action or take it away from you, is not to be regarded by you as any intimation of what I would do were I in your place. If there is any evidence at all to support a claim, then the issue is for the jury and for the jury to say whether or not the evidence is sufficient to warrant a finding one way or the other. All of you must concur in the finding of a verdict. Two forms of verdict have been prepared. One of them, you will use if you find generally for the defendant. In case you find for the plaintiff, the other has a blank left for the insertion of the amount. You will formally fill in the amount found due, if you so find, and the foreman will sign the verdict. You may retire."

(Jury retires.)

Mr. FERRARI.—May I have an exception to the charge, your Honor?

The COURT.—You may have the exception, but a general exception will be of no avail to you.

Mr. FERRARI.—Well, the only part I object to is the portion with reference to the effect of accepting the oral promise. And also—

The COURT.—The effect of accepting the oral promise? I don't believe [96] I understand what you mean.

Mr. FERRARI.—That portion of the charge that the Court instructed the jury that they should take into consideration the effect of accepting the oral promise—

Mr. TROWBRIDGE.—And we would like to have the record show that the jury has gone out, your Honor.

The COURT.—Of course, they are gone from the box, but are in the corridor and I will have them return if you so desire and permit either side to take exceptions. The jurors are still deemed to be present, and I will recall them if I desire to modify the instructions given.

Mr. TROWBRIDGE.—We have no exceptions, your Honor.

The COURT.—That is all, then.

(Whereupon the jury having considered their verdict, returned into Court, and returned their verdict, finding for the defendants.)

Respectfully submitted,

LOUIS FERRARI,

Attorney for Plaintiff. [97]

Memorandum Opinion.

Touching the instructions to the jury, I have corrected the proposed bill to make it speak truly. The exceptions interpolated in the proposed bill were not in fact taken; that is conceded. Counsel for the plaintiff seeks to justify their insertion now by invoking a statement made from the bench early in the trial that "all adverse rulings would be deemed to be excepted to." But this was intended only for rulings upon the admission and exclusion of evidence. In such cases the Court's attention is

called to the particular point of law relied upon by counsel, and after being advised of their views and rulings upon the objection, he grants an exception as of course; hence the mere noting of exceptions is thought to be a formality only, and serves no useful purpose.

But "exceptions" to instructions are more in the nature of objections, and are the only means by which the Court's attention is drawn to the point of law thought by counsel to be material. Especially when, as in this case, instructions are given orally, there may be errors of inadvertence which could very readily be corrected if they were pointed out. It is for that reason that standing rules generally—as in this district and in the Circuit Court of Appeals—require that exceptions to instructions specifically point out the particulars in which it is thought there is error. The statement here relied upon from the bench has been made by the writer in a great number of cases, covering a period of many years, and now for the first time the suggestion is made that it should be regarded as relieving attorneys from the necessity of particularizing their exceptions to instructions. It is difficult to believe that counsel here could have so understood at the time. Such a meaning would imply an intent on the part of the presiding [98] Judge not only to set aside a standing rule of the district, but to transcend a standing rule of the Appellate Court. But it conclusively appears that such was not the understanding at the time. Counsel did not rely upon such a theory, but immediately after the instructions

were given he undertook expressly to take exceptions. Such action would have been wholly unnecessary if the subject was understood to be covered by the statement now relied upon. But even if he had had such an understanding, he was at the time expressly advised that, to be of any avail to him, his exceptions to the instructions must be specific and particular; whereupon there was an attempt at specifications, such as the foregoing record shows. But whether because of the inadequacy of the explanation of counsel or the faulty understanding of the Court, the precise point of the objection or exceptions seems not to have been understood.

In view of these considerations, it is thought that, under Rule 10 of the Circuit Court of Appeals, the instructions might properly be excluded from the bill. But while I think the exceptions are insufficient, in order to avoid multiplicity of procedure in trying out the question, I am making the record show fully and precisely what occurred and shall leave it to the appellate court to determine for itself how far the instructions may be reviewed.

I should add that I overrule defendant's objection that the exceptions, such as they are, were not taken while the jury was still at the bar. The jurors were in the custody of the bailiff, just outside of the courtroom, subject to be recalled, and were held for the very purpose of being recalled should it be found necessary to modify or supplement the instructions as given.

With this explanation, the foregoing is duly settled and allowed as plaintiff's bill of exceptions.

Dated September 10, 1921.

FRANK S. DIETRICH,
District Judge. [99]

Due service and receipt of a copy of the within proposed bill of exceptions is hereby acknowledged this 1st day of July, 1921.

CUSHING & CUSHING,
Attorneys for Defendants.

[Endorsed]: Filed Sept. 12, 1921. Walter B. Maling, Clerk. [100]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Division Two.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Petition for Writ of Error.

To the Honorable, the United States District Court Above Named, and to Honorable FRANK S. DIETRICH, Judge Thereof:

The Bank of Italy, plaintiff in the above-entitled action, feeling itself aggrieved by the verdict of the jury and the judgment rendered against it in the above-entitled cause, on the 21st day of June, 1921, and claiming that in the trial of said cause certain

errors were committed to its prejudice, all of which appear in detail in the assignment of errors filed herewith, comes now, by Louis Ferrari, its attorney, and petitions the said Court for an order allowing the said plaintiff to prosecute a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and that an order be made fixing the amount of security which the said plaintiff shall give and furnish upon said writ of error; and that upon the giving of such security all further proceedings in the Court be suspended and stayed until the determination of said Writ of Error by the United States Circuit Court of Appeals for the Ninth Circuit. [101]

And your petitioner will ever pray.

Dated at San Francisco, California, October 5th, 1921.

LOUIS FERRARI,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 5, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [102]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Division Two.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Assignment of Errors and Prayer for Reversal.

Bank of Italy, the plaintiff in the above-entitled action, makes and files the following assignment of errors herein to the United States Circuit Court of Appeals for the Ninth Circuit.

The District Court erred in each of the following rulings made by it on the trial of said action:

1. In sustaining the defendants' objection to the following question propounded by the plaintiff to witness T. W. Lacy called for the plaintiff:

> "Q. When you say that he (F. Romeo) stated he did not accept the draft when the goods arrived, did he use the word 'accept' in the same sense as 'honor' is used?"

2. In overruling plaintiff's objection to the admission in evidence of Defendants' Exhibit "A," being a contract between F. Romeo & Co. and F. A. Memillo for the purchase of olives.

3. In overruling the objection of plaintiff to the

testimony of F. Mennillo in regard to the contract between Mennillo and F. Romeo & Co.

4. In sustaining defendants' objection to the following [103] question propounded by plaintiff to the witness, F. Romeo:

> "Q. You say that Mr. Morse would not have cashed the draft otherwise. You do not think it would have been good banking practice for him to have cashed it if he knew the payment was conditioned upon the arrival of the goods?"

5. In overruling plaintiff's objection to the admission in evidence of the letter dated May 2, 1919, from F. Romeo to F. Romeo Company in New York, and which letter was introduced in evidence as Defendants' Exhibit "B."

6. In overruling plaintiff's objection to the admissibility of a telegram dated April 29, 1919, from F. Romeo to F. Romeo & Co., which telegram was marked Defendants' Exhibit "C."

7. In overruling plaintiff's objection to the introduction in evidence of copies of bills of lading which were received in evidence and designated as Defendants' Exhibits "D" and "E."

8. In overruling plaintiff's objection to the following question propounded by defendant to the witness W. O. Johnson called for the defendant:

> "Q. Was there a carload of olives shipped from Lindsay on May 9th, to F. Romeo & Co. by F. A. Mennillo?"

9. In overruling plaintiff's objection to the following question propounded by the defendant to the the witness W. O. Johnson:

"Q. If, when olives are supposed to be ready to ship, when they are received by a purchaser they are reddish yellow, are they in good condition?"

10. In overruling plaintiff's objection to the following question propounded by the defendant to the witness Marie J. Romeo:

"Q. What was the conversation as well as you can remember?"

11. In giving to the jury on the Court's own motion, [104] the following instruction:

"If the plaintiff was going to pay out over five thousand dollars on this draft, and if as a condition to doing that, it was requiring the defendant to make an absolutely unconditional promise to pay, you may properly ask whether it is or is not probable that it would have taken an oral promise; or would it have required a written acceptance? In balancing the probabilities and improbabilities on this point, you may consider the admitted fact that at the very time the defendant's president was present at the bank, and *and* according to the plaintiff's evidence, was authorized to enter into a formal written acceptance; and further,—if you believe the plaintiff's testimony—that the draft was there, made out, and of course it could have been endorsed with a written acceptance forthwith and without very much trouble. You may also bear in mind the nature of the plaintiff's business and the fact that not only the Statutes of California, but of most states, require acceptances

to be in writing, and in the light of this and other circumstances in evidence, say whether the defendants did agree absolutely and unconditionally to pay the amount of the draft."

12. In giving to the jury on the Court's own motion, the following instruction:

"And I may add, in this connection, that as a circumstance bearing upon the main question as to just what agreement, if any, was had in the bank, you may not improperly consider just what the plaintiff actually parted with. As I have already explained, the plea is that it was induced by Mr. Romeo to part with a large amount of money, practically five thousand dollars. The evidence as to just how far it changed its position on May 2d, and as to what occurred there is not very specific. The witnesses speak of crediting F. A. Mennillo & Company, but whether or not the Bank actually paid out $5,000.00, or any other amount, is not definitely shown. If you believe the plaintiff's testimony, it appears that Mennillo & Company was indebted to the Bank, and according to the testimony of some of them, it held some of this product, this product, as collateral security, and furthermore that F. A. Mennillo & Company was a depositor, and it may be important to you to inquire, as bearing upon the general question, as to whether or not the plaintiff bank was in any worse position after the transaction was over with than it was before, whether it paid out any money, or whether it simply cred-

ited Mennillo & Company upon the indebtedness due to it, or whether it took the draft for collection in the ordinary way when such paper is deposited by a depositor, crediting his account, with the understanding that if not collected, the account shall then be debited. In that connection, it is proper to call your attention to the fact that the draft bears an endorsement of guaranty by Mennillo & Company. [105]

13. In giving to the jury on the Court's own motion the following instruction:

"If you find that the evidence preponderates in favor of the plaintiff upon this issue, then you should award it the amount of the draft with interest thereon at seven per cent from the maturity of the draft. Am I right as to your legal rate?

Mr. FERRARI.—Yes, seven per cent.

The COURT.—If, on the other hand, you do not find such preponderance in favor of the plaintiff, then you are to find against it in this branch of the case, and consider the view pleaded by the defendants, that is a promise to pay the residue of the contract price as shown by the draft, only when and in case the olives were found to be as called for by the contract, upon their inspection on arrival in New York.

Now, speaking of that branch of the case, the defendant was bound to accept the olives only if they were up to contract standards. If you find that the understanding was, as testified by

Mr. Romeo on the stand, that is, that the olives were to be received in New York and inspected, and the draft to be paid only in case they were found to be up to contract standard, then it was the duty of the defendant upon the arrival of the olives and their receipt in New York to inspect them without unusual delay, and upon inspection, if they found them to be defective, promptly to notify the shipper, F. A. Mennillo & Company.

You have heard the evidence upon what occurred upon the arrival of the olives. Most of it, I think, was in the form of telegrams and letters passing between the two parties to the contract. Retention of the shipment for an unreasonable time, without objection or complaint, may be construed as an acceptance at law. But if the purchaser promptly notifies a shipper, he is not bound to return the shipment. So here, if you find that Romeo & Company promptly notified Mennillo & Company of defects in the olives, and of course, if you further find that the olives were not up to contract standard, then it was not the duty of Romeo at New York, either to return the olives to the carrier, that is to the railroad company, or to abandon them. If, as the evidence tends to show, it advised Mennillo & Company of its claim that the olives were defective and not up to contract, and if they were not up to contract, and if defendant further advised that the olives were held subject to the shipper's orders, and if thereupon Mennillo &

Company remained silent or failed to direct what should be done with the olives, the defendant had the right, and it was its duty, to retain the olives and to dispose of them at such prices as were practicable in order to diminish the loss. That is, they were under obligations to make as much of a salvage as possible. There is no contention, as I understand, that the defendant failed in this respect, that is, failed to sell at such prices as were obtainable, or that anything [106] now remains due from the defendant to Mennillo & Company on account of the moneys thus received for the olives. Hence, if upon this branch of the case, unless you find that the olives were up to contract standards, or that notwithstanding their defects, the defendant accepted them and waived the defects, your verdict must be for the defendant."

14. In failing to instruct the jury to find in favor of the plaintiff.

15. In entering judgment against the plaintiff on the verdict of the jury.

16. In denying the motion of the plaintiff for a new trial in this action.

WHEREFORE the said plaintiff and plaintiff in error prays that the judgment of said Court be reversed.

LOUIS FERRARI,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 5, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [107]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Division Two.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Order Allowing Writ of Error and Fixing Amount of Bond.

The complainant having filed herein and presented herewith a petition for a writ of error and an assignment of errors,—

NOW, THEREFORE, on motion of Louis Ferrari, attorney for the plaintiff, IT IS ORDERED that a writ of error be, and the same is hereby allowed for the review of the judgment and the verdict entered herein on the 21st day of June, 1921, by the United States Circuit Court of Appeals for the Ninth Circuit, and that the amount of the bond on said writ of error be, and the same is, hereby fixed at the sum of $500—five hundred dollars ($500), and upon the giving of such bond all further proceedings in this court be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated: San Francisco, California, October 5th, 1921.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Oct. 5, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [108]

(Bond on Writ of Error.)

KNOW ALL MEN BY THESE PRESENTS, That we, the Bank of Italy, a corporation as principal and London & Lancashire Indemnity Company of America, a corporation organized under the laws of the State of New York, and having its principal place of business in the city of New York, State of New York, as sureties, are held and firmly bound unto F. Romeo & Co., Inc., in the full and just sum of Five Hundred and 00/100 ($500.00) Dollars, to be paid to the said F. Romeo & Co., Inc., its certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 6th day of October in the year of our Lord one thousand, nine hundred and twenty-one.

WHEREAS, lately at a District Court of the United States for the Northern District of California (Southern Division) in a suit depending in said court, between The Bank of Italy, a Corporation, Plaintiff, vs. F. Romero & Co., Inc., and F.

Romeo, Defendants, a judgment was rendered against the said plaintiff and the said plaintiff having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said F. Romero & Co., Inc., defendant, citing and admonishing it to be and appear at a United Ctates Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California on the fifth day of November, A. D. 1921.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said The Bank of Italy, a corporation, plaintiff, shall prosecute its said writ of error to effect, and answer all [109] damages and costs if it fail to make the said plea good, then the above obligation to be void; else to remain in full force and virtue.

THE BANK OF ITALY. (Seal)
By A. P. GIANNINI, Pres. (Seal)
LONDON & LANCASHIRE INDEMNITY COMPANY OF AMERICA.
(Seal)
By CHAS. A. PREVOST, (Seal)
Resident Vice-president.

Acknowledged before me the day and year first above written.

Attest: S. H. PERKINS,
Resident Assistant Secretary.

Premium charged for this bond is $10.00 per annum.

Form of bond and sufficiency of sureties approved.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Oct. 7, 1921. Walter B. Maling, Clerk. [110]

In the District Court of the United States in and for the Southern Division of the Northern District of California, Division Two.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., and F. ROMEO,
Defendants.

Praecipe for Record on Writ of Error.

To the Clerk of said Court:

Please prepare transcript on writ of error as follows:

Complaint.
Answer.
Verdict.
Judgment.
Bill of exceptions.
Petition for writ of error.
Assignment of errors.
Order allowing writ of error.
Bond on writ of error.
Writ of error.
Citation on writ of error.
Motion for new trial.
Order denying new trial.

Opinion of the Court denying motion for new trial.
Opinion of the Court and order settling bill of exceptions.

Dated: October 5th, 1921.

LOUIS FERRARI,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 5, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [111]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC., et al.,
Defendants.

Order Allowing Withdrawal of Original Exhibits.

IT IS HEREBY ORDERED that the exhibits in the above-entitled cause be and hereby are allowed to be withdrawn from the files of this office and transmitted by the clerk of this court to the United States Circuit Court of Appeals for the Ninth Circuit as a part of the record upon writ of error; said original exhibits to be returned to the files of this court upon the determination of said appeal by said Circuit Court of Appeals.

San Francisco, Cal., November 8, 1921.

FRANK H. RUDKIN,
Judge.

[Endorsed]: Filed Nov. 8, 1921. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [112]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,417.

THE BANK OF ITALY, a Corporation,
Plaintiff,

vs.

F. ROMEO & CO., INC.,
Defendant.

Certificate of Clerk U. S. District Court to Record on Writ of Error.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred twelve (112) pages, numbered from 1 to 112, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing re-

turn to writ of error is $49.60; that said amount was paid by the plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 22d day of November, A. D. 1921.

[Seal] WALTER B. MALING,

Clerk United States District Court for the Northern District of California. [113]

Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, To the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division (2d Division) GREETING:

BECAUSE, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Bank of Italy, a corporation, plaintiff in error, and F. Romeo & Co., Inc., defendant in error, a manifest error hath happened, to the great damage of the said The Bank of Italy, a corporation, plaintiff in error, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the

record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 7th day of October, in the year of our Lord one thousand nine hundred and twenty-one.

[Seal] WALTER B. MALING,
Clerk of the United States District Court for the Northern District of California.

Allowed by:

_____.

_____.

Due service and a receipt of a copy of the within writ of error is hereby admitted this 7th day of October, 1921.

CUSHING & CUSHING,
Attorneys for Defendant F. Romeo & Co., Inc.

[Endorsed]: No. 16,417. United States District Court for the Northern District of California, Second Division. The Bank of Italy, a Corp., Plaintiff in Error, vs. F. Romeo & Co., Inc., Defendant in Error.

Writ of Error. Filed Oct. 8, 1921. Walter B. Maling, Clerk. [114]

Return to Writ of Error.

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mentioned is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal] WALTER B. MALING,

Clerk of the United States District Court for the Northern District of California. [115]

Citation on Writ of Error.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to F. Romeo & Co., Inc., GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office of the United States District Court for the Northern District of California, Southern Division (2d Divi-

sion), wherein The Bank of Italy, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge for the Northern District of California, this 7th day of October, A. D. 1921.

WM. C. VAN FLEET,
United States District Judge. [116]

United States of America,—ss.

On this 7th day of October, in the year of our Lord one thousand nine hundred and twenty-one, personally appeared before me Tobias J. Bricca, the subscriber, and makes oath that he delivered a true copy of the within citation to Mr. Trowbridge, an attorney in the office of Cushing & Cushing, which attorney represents the defendants, F. Romeo & Co., Inc.

TOBIAS J. BRICCA.

Subscribed and sworn to before me at San Francisco, this 7th day of October, A. D. 1921.

[Seal] THOMAS S. BURNES,
Notary Public for the City and County of San Francisco, State of California.

[Endorsed]: No. 16,417. United States District Court for the Northern District of California. The Bank of Italy, a Corp., Plaintiff in Error, vs. F. Romeo & Co., Defendant in Error. Citation on Writ

of Error. Filed Oct. 8, 1921. Walter B. Maling, Clerk.

[Endorsed]: No. 3804. United States Circuit Court of Appeals for the Ninth Circuit. The Bank of Italy, a Corporation, Plaintiff in Error, vs. F. Romeo & Co., Inc., a Corporation. Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

Filed December 1, 1921.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Court of Appeals for the Ninth Circuit.

THE BANK OF ITALY, a Corporation,
Plaintiff in Error,

vs.

F. ROMEO & CO.,
Defendant in Error.

Order Extending Time to and Including December 3, 1921, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the plaintiff in error in the above-entitled cause may have to, and including December 3, 1921, within

which to file the record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated November 5, 1921.

HUNT.
Circuit Judge.

[Endorsed:] No. 3804. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including December 3, 1921, to File Record and Docket Cause. Filed Nov. 5, 1921. F. D. Monckton, Clerk. Refiled Dec. 1, 1921. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Case No. 3804.

THE BANK OF ITALY, a Corporation,
Plaintiff in Error,

vs.

F. ROMEO & CO., INC., a Corporation,
Defendant in Error.

Stipulation Concerning Record on Appeal.

WHEREAS, the defendant in error has complained that the record on appeal on file in the above-entitled court and cause is imperfect and incomplete because none of the papers showing the removal of said cause from the Superior Court of the State of California, in and for the City and

County of San Francisco, to the United States District Court, for the Northern District of California, Southern Division, have been set forth in said record on appeal, and also because the minute order dismissing said action in said United States District Court, for the Northern District of California, Southern Division, as to the defendant F. Romeo does not appear in said record on appeal,—

NOW THEREFORE, IT IS HEREBY STIPULATED AND AGREED by and between the parties to the above-entitled cause that the record on appeal shall be deemed to include the following papers and documents:

1. Petition for removal of cause from the Superior Court of the State of California, in and for the City and County of San Francisco, to the United States District Court, for the Northern District of California, Southern Division, filed in said Superior Court on July 9, 1920.

2. Notice of filing petition for removal of cause from the Superior Court of the State of California, in and for the City and County of San Francisco, to the United States District Court, for the Northern District of California, Southern Division, filed in said Superior Court on the 9th day of July, 1920.

3. Bond on removal filed in said Superior Court on the 9th day of July, 1920.

4. Order of the Superior Court of the State of California, in and for the City and County of San Francisco, ordering said cause removed to the United States District Court, for the Northern Dis-

trict of California, Southern Division, filed in said Superior Court on the 9th day of July, 1920.

5. Endorsement on certified transcript of record filed in the United States District Court for the Northern District of California, Southern Division, which transcript consists of copies of the papers numbered 1, 2, 3, and 4 herein, which endorsement shows that the copies of said papers, duly certified by the Clerk of the Superior Court of the State of California, in and for the City and County of San Francisco, were filed in the office of the Clerk of the United States District Court for the Northern District of California, Southern Division, on August 6, 1920.

6. Minute order of the United States District Court for the Northern District of California, Southern Division, dated June 21, 1921, dismissing said cause as to the defendant F. Romeo by consent.

IT IS FURTHER STIPULATED AND AGREED that should it become necessary for either party to refer to any or all of said papers, or should the above-entitled court desire to inspect any or all of said papers, that copies thereof, certified by the Clerk of the United States District Court for the Northern District of California, Southern Division, shall be procured and filed in the office of the Clerk of the above-entitled court by the plaintiff in error and may be referred to for all purposes as fully as if said certified copies, and each of them, had been incorporated and set forth at length in the transcript of record now on file in the above-entitled cause.

IT IS FURTHER STIPULATED AND AGREED that neither party to said cause will make any objection on account of the absence of any of said papers from the record on appeal now on file in the above-entitled cause, nor will either party in any way claim that the judgment appealed from is defective or improper by reason of the absence of any of said papers from said record on appeal, or that the above-entitled court has not jurisdiction of said cause or of the appeal from said judgment by reason of the absence of any of said papers from said record on appeal.

Dated: December 28, 1921.

LOUIS FERRARI,
Attorney for Plaintiff in Error.
CHARLES S. CUSHING,
O. K. CUSHING,
WILLIAM H. GORRILL,
DELGER TROWBRIDGE.
Attorneys for Defendant in Error.

Approved:

W. H. HUNT,
U. S. Circuit Judge.

[Endorsed]: Case No. 3804. In the United States Circuit Court of Appeals for the Ninth Circuit. The Bank of Italy, a Corporation, Plaintiff in Error, vs. F. Romeo & Co., Inc., a Corporation, Defendant in Error. Stipulation Concerning Record on Appeal. Filed Jan. 3, 1922. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

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For the Ninth Circuit

BANK OF ITALY (a corporation),
Plaintiff in Error,

vs.

F. ROMEO & CO., INC. (a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

LOUIS FERRARI,
Attorney for Plaintiff in Error.

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Issue Involved.

This writ of error is prosecuted to reverse the judgment of the District Court for the Southern Division of the Northern District of California, Division No. Two, entering judgment in favor of the defendant, F. Romeo & Co., Inc., upon a verdict of the jury in favor of said defendant. The action against the defendant F. Romeo individually was voluntarily dismissed during the trial by the plaintiff.

The contention of the plaintiff as set forth in its complaint is that the defendant, on the second day of May, 1919, in consideration of the discount by

the said plaintiff of the draft dated May 2, 1919, payable to F. A. Mennillo, and drawn on F. Romeo & Co., Inc., for the sum of five thousand seven hundred forty-three dollars and sixty-three cents ($5743.63) at sixty days' sight, orally promised and agreed to pay said draft upon maturity (Tr. folio 1, par. 4 and 5, page 2).

The defendant in its pleading did not deny the execution or delivery of the draft, nor the agreement to accept the same, but alleged that the agreement to accept the draft was conditioned upon the arrival of the olives in New York in a satisfactory condition. We quote from the answer of the defendant the following:

> "On or about the 2nd day of May, 1919, defendant F. Romeo & Co., Inc., paid to one F. A. Mennillo on account of the purchase price of certain preserved olives for human consumption theretofore purchased or agreed to be purchased from said F. A. Mennillo by said defendant F. Romeo & Co., Inc., the sum of eight thousand ($8000) dollars, and *orally promised* said F. A. Mennillo that if said olives, which had theretofore been shipped by said F. A. Mennillo to the City of New York, in the State of New York, should, upon examination by defendant F. Romeo & Co., Inc., at the warehouse of defendant F. Romeo & Co., Inc., at the said City of New York, prove to be of good quality and condition, as provided in the contract of purchase of said olives theretofore entered into between said F. Romeo & Co., Inc., and said F. A. Mennillo, and as represented and warranted by said F. A. Mennillo, defendant F. Romeo & Co., Inc., *would accept a draft* for the sum of five thousand seven hundred and forty-three and

63/100 ($5743.63) dollars drawn by said F. A. Mennillo upon said F. Romeo & Co., Inc., at 374 Washington Street, New York City, N. Y., payable at sixty (60) days' sight to the order of F. A. Mennillo." (Tr. folio 6, pages 6 and 7.)

Phases of the Case.

The Court below, in summing up the case, correctly divided the same into two phases, namely:

First, assuming that the promise of the defendant was unconditional, as claimed by the plaintiff, then it was only incumbent upon the plaintiff to prove the promise, the presentation of the draft and the refusal to accept or pay, and the condition or quality of the merchandise shipped became entirely immaterial in the case.

Second, assuming that the promise to accept was conditioned upon the arrival of the olives in New York in a satisfactory condition and proved to be of good quality, then it was incumbent upon the plaintiff to prove, by a preponderance of the evidence, that the olives were either in a satisfactory condition and were of good quality, or that the defendant, by accepting them, waived its right to complain about the condition or character of the merchandise.

For the sake of convenience in the following discussion we shall refer to said phases as the first and second, respectively.

FACTS SUPPORTING PLAINTIFF'S CONTENTION ON FIRST PHASE.

In pointing out to the Court the evidence which sustains the plaintiff's contention on all matters of fact, we are mindful of the rule that this Court will not resolve any conflict in testimony and that on all points where there is a conflict the defendant is entitled to the presumption that the jury resolved the conflict in its favor. Notwithstanding this rule, however, we confidently maintain that all the testimony supports, without contradiction and without conflict, our contention that the promise made by the defendant F. Romeo & Co., Inc., to accept the draft was absolutely unconditional.

It is agreed by both sides that the only promise with reference to this transaction was made at the Bank of Italy, Seventh and Broadway, Los Angeles, California, on the 2nd day of May, 1919 (Tr. folio 43, pages 50-51).

On this point the plaintiff produced the following testimony, to-wit:

Testimony of C. R. Mennillo:

> "I got word from the Bank of Italy that there was some transaction going on with reference to some olives, and I went to the Bank of Italy at Los Angeles, 7th and Broadway Branch, and there I met Mr. and Mrs. Romeo. * * * The parties who took part in that conversation were James Moore, vice-president, I presume, of the Bank of Italy, Mr. F. Romeo, his wife and myself. They had two bills of lading and the amount was $13,743.63, and Mr. Romeo informed us that his New York concern, the

amount of the letter of credit opened was only $8,000, and if he could be obliged to give them a draft for the balance at sixty days. The bank seemed to be satisfied with the arrangement and the transaction was closed right there." (Tr. folios 36 and 37, pages 41 and 42.)

Testimony of James O. Moore:

"At the Bank of Italy, Mr. Romeo, I believe, came into the office first and Mr. Mennillo followed shortly after with a bill of lading covering either a car or two carloads of olives, against which the East River National Bank issued an acceptance credit up to $8000, I believe, I am just a little vague on that, together with a draft payable on arrival of goods or at sight, which Mr. Romeo O. K.'d and accepted the bill of lading for. I refer to two drafts, one for $8000, which was covered by the East River guaranty, and the other the draft, Plaintiff's Exhibit No. 1. At the time the draft sued on here was drawn there were present Mr. Romeo, Mr. Mennillo and, I believe, Mrs. Romeo. This draft was simply to take up the balance between the invoice and the letter of credit. * * * This draft, Plaintiff's Exhibit 1, represents the excess of the invoice for the two cars of olives over the letter of credit." (Tr. folios 38 and 39, pages 44 and 45.)

Testimony of Mr. T. W. Lacy:

"As nearly as I can relate the conversation was to the effect that Mr. Mennillo requested that we deliver the bill of lading on this draft to F. Romeo & Company, which we did, and we gave R. Mennillo & Company credit for the face value of the draft. I was not there during the whole of the conversation. Mr. Moore called me up when part of the conversation had been completed, if I remember correctly. At

> that time Mr. Romeo stated that upon arrival of the goods in New York they would accept the draft. * * * Mr. Romeo stated the draft would be accepted upon its presentation and arrival of the goods in New York. * * * The draft for $5,743.63 was present at the meeting and was already drawn when Mr. Romeo said that it would be accepted upon its presentation and arrival of the goods in New York." (Tr. folios 40 and 41, pages 46 and 47.)

To contradict this testimony the defendant called two witnesses, one of whom, Mrs. Marie J. Romeo, when asked concerning the conversation in question, testified as follows:

> "I was at the Bank of Italy on the 2nd day of May, 1919. I fixed that date because it was my birthday and my husband brought me a bouquet of red roses. I could not say that I heard the conversation that there took place. I knew what I was there for and I very likely heard it because I am not deaf altogether, but I do not remember positively. I guess I sat about this distance (indicating) from Mr. Moore's desk; I could not say that I paid particular attention to the conversation; it is hard to tell what was said; I don't know. I did not know I was going to be put in this chair to report it and I did not pay any particular attention; I knew what we went there for. I had been at the bank several times previously with Mr. Romeo and on each occasion it was for the transaction of the same kind of business—the taking up of letters of credit for other shipments of different kinds of goods." (Tr. folio 65, page 80.)

It is a significant fact that this witness, just before she was asked concerning the conversation

at the bank, was able to give the exact details of a purported conversation which she claimed was held between her husband and Mr. Mennillo with reference to this transaction at the Clark Hotel. Under these circumstances it is not only fair and reasonable to construe this testimony as in no way conflicting with the testimony of the previous witnesses hereinbefore set forth, but as a strong corroboration of the same.

We now take up the testimony of the only other witness to this transaction produced by either party, with reference to the conversation in question, namely, Mr. Francisco Romeo, president of the defendant F. Romeo & Co. Inc., and its representative in the instant transaction.

At the very outset we desire to call attention to the fact that the testimony of this witness is subject to all the infirmities and criticisms which we made against the testimony of Marie J. Romeo. This witness testified in extreme detail concerning the conversation with Mr. Mennillo, which conversation took place two days before the transaction in question and at which conversation no representative of the Bank of Italy was present and the substance of which conversation was never made known to any of the representatives of the Bank of Italy (Tr. folio 43, page 50).

After giving the details of the conversation with Mr. Mennillo which took place apparently on the 30th of June, the witness Francisco Romeo, on direct examination, testified as follows:

> "We went to the bank on May 2nd, and there I told Mr. Moore the same arrangement that I had made with Mr. Mennillo. I told him that we were not paying the full amount of that invoice because I had not examined the quality of the goods. The amount of the invoice of those two cars was $13,743.07, I think. At the bank there was no conversation about this draft." (Tr. folio 43, page 51.)

The foregoing is all the testimony of the witness Francisco Romeo, which was offered by the defendant to substantiate the allegation in the answer of the defendant to the effect that the promise to accept the draft was conditional. We submit there is not one word in said testimony that shows that the acceptance of the draft in question was dependent upon any conditions whatsoever, nor is there anything in the testimony just quoted denying or tending to deny the testimony of the witnesses whose testimony has been referred to and who testified that the promise in question was absolutely unconditional. The testimony of said Francisco Romeo may be absolutely true, and yet the testimony in this record will show without contradiction or conflict that the promise to accept the draft was absolutely unconditional. It may possibly be contended by the defendant in this case that the lack of testimony on this particular subject in the direct examination of the witness Francisco Romeo, was due to the fact that the questions propounded to him were not specific enough and not pointed enough.

In order to remove the foundation for such contention we turn to the cross-examination of this

witness, where counsel for the plaintiff directly and pointedly asked of the witness Francisco Romeo questions touching the very gist of the contentions of the defendant as set forth in its answer. From the cross-examination of said witness we call attention to the following:

> "I do not remember exactly that we again had the same conversation in the bank which we had previously had with Mr. Mennillo at the Clark Hotel with reference to this shipment. It was all agreed he was going to draw sixty days' sight draft for the balance and my firm was to accept the draft after approval of the quality of these two cars in transit. We were to accept and pay the draft if the quality of the goods was satisfactory." (Tr. folio 47, page 57.)

After the witness had testified as follows and in order that there might be absolutely no question as to the condition of the testimony of Francisco Romeo on this point, counsel for plaintiff asked the direct question almost in the words used by the defendant in alleging the conditional nature of the promise in its answer as follows:

> "Q. *Are you sure, Mr. Romeo, that anything was said in the Bank of Italy when you went there to negotiate that draft with reference to the condition that the draft was only to be paid in the event that the goods were satisfactory?*
>
> "A. There was no conversation on the subject."

The witness continued to testify:

> "If I am not mistaken, I *think* I reported to Mr. Moore the agreement. I am not positive,

but Mr. Moore was satisfied to take that $8000. Mr. Moore knew the condition because I stayed there about half an hour in the bank and we were talking about this transaction.

"Q. But it is quite possible, Mr. Romeo, that you did not specifically make that conditional statement, namely, that the draft would only be accepted in case the goods met with your approval, in the bank?

"A. That was understood; Mr. Moore knew that.

"Q. You say he knew that. You had never talked to Mr. Moore about it?

"A. Well, I stayed there about half an hour in the bank, and we were talking about this transaction.

"Q. But you have no independent recollection of making that statement to Mr. Moore, that you say was made in the conversation between you and Mr. Mennillo?

"A. Well, if I had promised to accept it on that condition, I would expect that I would.

"Q. That is not an answer to the question. You are not positive, as you have just stated?

"A. I think we had the conversation, otherwise Mr. Moore would not have accepted the draft." (Tr. folio 48, pages 57, 58.)

It will be noted from the foregoing that the witness on direct examination and on cross-examination was given every opportunity to testify that the acceptance of the draft was dependent upon the arrival of the goods in New York satisfactory as to condition and quality. He was given every opportunity to substantiate by direct, clear and concise testimony the allegations of his answer on this subject, but instead of embracing the opportunity, the witness, who for all intents and purposes was

the defendant itself, resorted to evasion, and the only time that he was compelled to give a direct answer as to whether or not the draft was subject to the condition in question, he replied directly:

"There was no conversation on the subject."

We respectfully submit that the testimony of this witness, stripped of its argumentative and evasive features, absolutely substantiates the claim of the plaintiff, that in so far as the Bank of Italy was concerned the promise to accept this draft was absolutely unconditional.

On redirect examination counsel for the defendant, realizing that the testimony of the witness Francisco Romeo had corroborated all the witnesses for the plaintiff, endeavored to get the witness to testify that the promise was conditional, but signally failed. The witness in the redirect examination testified to no agreement whatsoever, but made the following statement:

> "The draft was to be accepted after examination and approval of the quality of the olives. That was said in Mr. Moore's presence." (Tr. folio 54, page 65.)

Clearly even this statement elicited on redirect examination after the witness had directly denied on direct examination and on cross-examination that there was any conversation held in the Bank of Italy to the effect that the promise to accept the draft was to be conditional, cannot, even though it be given full weight, be considered as even raising a conflict in the evidence. There is nothing in the

statement just quoted to show that Mr. Moore ever heard the statement or ever acquiesced in the same, or that there was ever any agreement with reference thereto, and the defendant in this case is left in the position where it has been unable to produce any testimony at all sufficient to even raise a conflict in the evidence, and for this reason all the testimony in the case supports the contention of the plaintiff, namely: that the promise to accept the draft was unconditional.

Not only does all the direct testimony, without conflict, show that the promise of the defendant in this case to accept the draft in question was unconditional, but all the circumstances point to the same conclusion. According to the testimony of Mr. Francisco Romeo and Mrs. Marie J. Romeo, the understanding that the draft was to be conditional was fully discussed with Mr. Mennillo a few days prior to May 2, 1919, and it is a significant fact that both Mr. and Mrs. Romeo remembered in detail the said previous conversation, but neither was able to give any particulars of any similar conversation that took place at the Bank of Italy. The only reasonable and natural inference to be drawn under these circumstances is that Mr. Romeo, having had the agreement with Mr. Mennillo, did not consider it necessary to inform the bank of the conditional nature of the transaction. That Mr. Romeo was mistaken in this cannot in any way help the case of the defendant nor create a conflict in the testimony where none exists.

Another powerful circumstance showing that the promise in this case was unconditional is the admitted fact that upon the discount of the draft by the Bank of Italy the bills of lading covering the goods in question were delivered to Francisco Romeo for the defendant. It is inconceivable that the bank would have delivered the bill of lading to Mr. Romeo on a conditional promise to accept the draft as claimed by the defendant. The fact that the bills of lading were delivered to the defendant at the bank shows that the bank fully relied upon the promise of the defendant to accept the draft and that in so far as the delivery of the goods was concerned the bank considered the transaction was complete.

The only other necessary elements to complete the case of the plaintiff were the proof that the Bank of Italy relied upon the promise and parted with the money and that the draft was duly presented and that acceptance and payment were refused by defendant. On these matters the testimony is entirely one way. That the Bank of Italy paid face value for the draft in question is shown by the following uncontradicted testimony:

F. A. Mennillo:

> "I don't know if they credited all at one time or at different times, but I got credit for the full amount of the invoice for both cars." (Tr. folio 30, pages 33-34.)

C. R. Mennillo:

> "We were given credit by the bank for $13,743.63."

* * * * * * *

"I know the Bank of Italy gave F. A. Mennillo credit for the amount of this draft. I had the bank book and it was entered in said book. I know also from the bank statement." (Tr. folio 37, pages 42-43.)

James O. Moore:

"I thereupon gave F. A. Mennillo & Co. credit on this transaction and also on the transaction involving the acceptance. In other words, I credited his account with $8000 and with $5743.63." (Tr. folio 39, page 45.)

T. W. Lacy:

"And we gave R. Mennillo & Company credit for the face value of the draft." (Tr. folio 40, page 46.)

The foregoing testimony was neither questioned nor contradicted by any witness or other testimony offered by the defendant.

On the question of the presentation of the draft and its refusal, the same was proven without contradiction by the following testimony from officers of the defendant corporation:

Joseph Lodato:

"A draft was presented to me by the East River National Bank for the Bank of Italy, a copy of which draft is set out in paragraph five of the complaint; I do not remember the exact date when this draft was presented, but it must have been after May 2nd. It was presented after the arrival of the car of Greek style olives and the first car of ripe olives. Mr. Italiano and I were present when it was presented by the East River National Bank, by messenger. * * * I told the messenger that we would not accept

the draft as we did not find the goods satisfactory. The messenger then went back to the bank." (Tr. folio 27, pages 29-30.)

Continuing:

"The board of directors of F. Romeo & Company agreed to refuse acceptance of that draft because the goods were not satisfactory, and they authorized me to so refuse the acceptance, which authorization was not in writing." (Tr. folio 29, page 31.)

Giovanni F. Romeo:

"I first learned that they had it when Mr. Lodato told me that the bank had presented for acceptance and had refused to accept this draft as we had previously agreed to do." (Tr. folios 70-71, page 87.)

Mr. Lodato and Mr. Romeo were both officers actively in charge of the business of the defendant corporation. Therefore under the theory adopted by the trial Court in this case, and the soundness of which theory has not been challenged by either of the parties, the plaintiff was entitled to judgment on the ground that the evidence, without conflict, proved and substantiated all the allegations of its complaint.

EVIDENCE SHOWS ACCEPTANCE OF GOODS.

Even if the promise in this case was contrary to the evidence, assumed to be conditional, the plaintiff would be entitled to recover in this action for the reason that the evidence clearly shows that the defendant accepted the goods in question.

It was shown by said testimony, without conflict:

First, that the bill of lading was actually delivered to Mr. Romeo at Los Angeles and forwarded by him to a firm in New York.

Testimony of Francisco Romeo:

> "I do not know if it was Mr. Moore or Mr. Mennillo who gave me the bill of lading as we were sitting there. I do not know if it was the Bank of Italy or Mennillo." (Tr. folio 49, page 59.)

Again:

> "I received the bills of lading covering these two carloads, at the bank." (Tr. folio 54, page 65.)

Testimony of T. W. Lacy:

> "The conversation was to the effect that Mr. Mennillo requested that we deliver the bill of lading on this draft to F. Romeo & Co., which we did." (Tr. folio 40, page 46.)

Testimony of Joseph Lodato:

> "F. Romeo sent through the mail two invoices attached to the two bills of lading. These bills of lading did not provide for inspection of the olives." (Tr. folio 26, page 28.)

Second, that the goods were removed to the store of the defendant.

Testimony of Giovanni F. Romeo:

> "I examined the Greek style olives the same date they were brought to our store." (Tr. folio 67, page 83.)

Testimony of F. Romeo:

> "About the middle of June I went to New York and there saw the olives that were covered by these two invoices." (Tr. folios 43, 44, page 51.)

Again:

> "After the olives arrived in New York they were examined by me and by other members of our firm. I did not leave them at the railroad station. They were in our store. They were there at the time they were examined; that was the understanding." (Tr. folio 48, pages 58-59.)

Third, that the said goods were fully examined. See testimony last above cited; also

Testimony of Giovanni F. Romeo:

> "The olives were first examined by me on the date they were withdrawn from the pier. I opened eight or ten barrels of Greek olives not previously opened by Mr. Italiano and Mr. Lodato. They opened and examined some barrels in the store before I did. When I came to the office on the day of the arrival of these olives and was informed that they had arrived, I immediately examined them. * * * Mr. Lodato and Mr. Italiano had opened some barrels before I arrived at the store." (Tr. folio 73, page 91.)

Fourth, that after examination the goods were commingled with other goods and carried in the general stock of the defendant.

Testimony of Giovanni F. Romeo:

> "The olives under Exhibits 'L' and 'N' were commingled and there were no identifying

> marks whereby we could subsequently tell the olives of one shipment from those of another. * * * In selling the ripe olives we could not tell whether they were from Exhibit 'L' or Exhibit 'N'." (Tr. folio 70, page 87.)

(Note: The olives affected by this transaction were represented by Exhibits "K" and "L".)

Again:

> "I again examined the Greek style olives at different intervals when I showed them to customers or brokers." (Tr. folio 69, page 85.)

Again:

> "While remaining in our possession, these olives were shown to the customers and to brokers in the trade for the purpose of selling them." (Tr. folio 76, page 96.)

Fifth, that thereafter the said goods were sold, not at auction sale or at a sale for the benefit of Mennillo, but were sold in the ordinary course of trade of the defendant over a period of over one year from their receipt, as first-class olives.

Testimony of Morris Levenkind, called for the defendant:

> "Q. Did you during the year 1920 do any business with F. Romeo & Co., Inc.? A. I did.
> Q. Did you buy from them any ripe olives?
> A. I did.
> Q. Of the style known as Lindsay Brand?
> A. I did.
> Q. About what time in 1920, do you know?
> A. In May.
> Q. State what you found as to the condition of these olives.
> By the COURT. In May, 1920?

Mr. FERRARI. Yes, your Honor.

The COURT. That is a year after this transaction.

Mr. FERRARI. Yes, but the testimony given shows that they are the same olives.

A. We bought the olives to be *No. 1 goods,* and after we took them in the house and shipped them to our customers we started to get complaints." (Tr. folios 83, 84, pages 106, 107.)

Again:

"Q. When did you buy these olives, the ripe olives, from Romeo & Company?

A. During May, 1920.

* * * * * * *

"Q. When you testified you bought one hundred cases of olives from Romeo & Company without examination and shipped them to your trade as A No. 1 olives.

A. I did." (Tr. folios 85, 86, pages 109, 110.)

Testimony of Francisco Romeo:

"We sold these olives because he (Mennillo) insisted that the olives were good quality and before they were a total loss we thought it better to sell them the best we could." (Tr. folio 49, page 59.)

Testimony of Giovanni F. Romeo:

"These olives were subsequently sold and we kept a separate account of these two lots; it would have been very difficult to keep these two accounts separate because of the limited space in the store." (Tr. folio 70, page 87.)

Again:

"While remaining in our possession these olives were shown to customers and to brokers

in the trade for the purpose of selling them." (Tr. folio 76, page 96)

The foregoing testimony shows conclusively that while the firm of Romeo & Co. were protesting about the condition of the olives and were threatening rejection, no rejection was in fact made and the goods were accepted, commingled with others from which they could not be segregated and sold as first class goods to the customers of the defendant. Moreover no account was ever given to Mennillo showing the amount that was received by the defendant for the sale of said goods nor, in fact, was it possible for the defendant to have given Mennillo an account of the sale of said goods by reason of the fact that the defendant had commingled them with others.

The testimony is also overwhelming to the effect that F. Romeo & Co. knew that the Bank of Italy was interested in these goods, at least to the extent of $5743.63, and yet not a single word of protest was sent to the Bank of Italy concerning the character of the goods nor was there ever an attempt made by the defendant to render an account to the Bank of Italy, nor was the Bank of Italy ever notified that on the payment of $8000, which the defendant had paid to Mennillo, the Bank of Italy might have the return of the goods. Under these circumstances the plaintiff in error contends that it was absolutely entitled to an instruction from the Court to the jury to the effect that there was no rejection of the goods and that the acts of the de-

fendant amounted to an acceptance. An instruction along this line was not only not given but the Court instructed the jury that the acts of the defendant were in keeping with its duty and were in no manner an acceptance of the goods.

> "So here, if you find that Romeo & Company promptly notified Mennillo & Company of defects in the olives, and of course, if you further find that the olives were not up to contract standard, *then it was not the duty* of Romeo at New York, either to return the olives to the carrier, that is to the railroad company, or to abandon them. If, as the evidence tends to show, it advised Mennillo & Company of its claim that the olives were defective and not up to contract, and if they were not up to contract, and if defendant further advised that the olives were held subject to the shipper's orders, and if thereupon Mennillo & Company remained silent or failed to direct what should be done with the olives, *the defendant had the right,* and it was its duty, to retain the olives and to dispose of them at such prices as were practicable in order to diminish the loss. That is, they were under obligation to make as much of a salvage as possible." (Tr. folio 95, pages 121, 122.)

Even if the Court had permitted this question to be decided by the jury without any suggestion that the defendant Romeo & Co. acted pursuant to its obligation and duty the plaintiff in error would not complain, but as the matter was presented to the jury the plaintiff was prevented from having a fair trial upon this issue and we respectfully contend that on this phase of the case the verdict of the jury is not sustained by the evidence.

AUTHORITIES SHOWING ACCEPTANCE.

On this point Benjamin on Sales, 6th Edition, at page 855, states as follows:

> "When goods are sent to a buyer in performance of the seller's contract, the buyer is not precluded from objecting to them by merely receiving them, for receipt is one thing and acceptance another. *But receipt will become acceptance if the right of rejection be not exercised within a reasonable time or if any act be done by the buyer which he would have no right to do unless he were the owner of the goods.*"

At page 859, the same author quotes from the case of Parker v. Palmer, 4 B. & A. 387, as follows:

> "In Parker v. Palmer the buyer, after he had seen fresh samples drawn from the bulk of rice bought by him which was inferior in quality to the original sample, offered the rice for sale at a limited price at auction but the limit was not reached, and the rice not sold. He then rejected it as inferior to sample; but held that by dealing with the rice as owner after seeing that it did not correspond with the sample, he had waived any objection on that score."

Particularly in point also is the quotation from the opinion of Lord Abinger in the case of Chapman v. Morton, cited by the same authority:

> "We must judge all men's intentions by their acts and not by expressions in letters which are contrary to their acts. If the defendant intended to renounce the contract he ought to have given the plaintiffs distinct notice at once that he repudiated the goods and that on such a day he should sell them by such a person for

the benefit of the plaintiffs. The plaintiffs could then have called upon the auctioneer for the process of the sale. Instead of taking this course the defendant has exposed himself to the imputation of playing fast and loose declaring in his letters that he would not accept the goods but at the same time preventing the plaintiffs from dealing with them as theirs."

From the two cases just cited, Benjamin, at page 860, deduces the following rule:

"The two preceding cases showing that a resale by the buyer after he had an opportunity of exercising an option either of accepting or of rejecting the goods delivered, is an acceptance, for by reselling he is presumed to have determined his election."

On the same subject, from Volume 23, page 259, of Ruling Case Law, we quote the following:

"In case of an executory contract of sale the buyer as a general rule is entitled, before accepting the goods, to a full opportunity of inspecting the same to see if they comply with the requirements of the contract and for this reason where goods are shipped to the buyer by carrier under an executory contract calling for goods of a certain quality, his reception of the goods is not necessarily an acceptance. *On the other hand, receipt will become acceptance if the right of rejection is not exercised within a reasonable time or if anything be done by the buyer that he would have no right to do unless he were the owner of the goods.*"

A case very much in point and having all the elements of the case at bar is that of Fred W. Wolf Co. v. Monarch Refrigerating Company, decided

by the Supreme Court of Illinois, December, 1911, and reported in Volume 96 N. E. at page 1063. This was an action brought by the seller against the buyer for the sale and installation of a refrigerating plant. Buyer, by letter, rejected the plant on the ground that the engine which was installed to operate said plant was defective and did not meet the requirements of the contract and endeavored, as a defense, to set off against the claim of the seller the value of said engine. It appeared, however, that while the buyer in writing rejected the plant, it continued to use the same in the carrying on of its business. The Court directed a verdict in favor of the seller and the buyer took an appeal. We quote from the opinion of the Court at page 1066:

> "Since the verdict was directed for the appellee (seller) all testimony which contradicts that in favor of the appellant (buyer) must be disregarded and all inferences must be drawn most favorably to it. The evidence cannot be weighed, and, if the facts are reasonably capable of a construction favorable to the appellant, such construction must be adopted. It must, therefore, be regarded as established that the plant delivered did not meet the requirement of the specifications, and that the appellant (buyer) was not bound to accept it. It will be assumed for the purpose of this case, though we do not express any judgment about it, that the letters of the appellant (buyer) declining to accept the engine constituted a notice in writing of the rejection of the plant. The questions then presented are whether the contined use and operation of the plant, including the engine, by the appellant after its rejec-

tion, before suit was brought, constituted, in law, an acceptance of the plant, or whether there is in the record any evidence reasonably tending to explain such use and operation on some other theory than an acceptance and whether, if there was such legal acceptance, the appellant thereby, under its contract, waived any claim for damages on account of the appellee's breach of its contract.

"It cannot well be contended that the appellant's continued use of the engine after May 26th did not constitute an acceptance of the plant unless the circumstances attending such use so qualified the act as to prevent its having the ordinary effect. The test was completed, the appellee had withdrawn its engineer, claimed to have performed its contract, and was demanding payment. The plant was then tendered in satisfaction of the contract. If it conformed to the contract the appellant was bound to accept it. If it did not substantially conform to the contract, the appellant had the right to accept or reject it, at its option. If it chose to retain and use the engine, it thereby accepted the ownership of it.

"Any act done by the buyer of goods tendered in fulfillment of a contract of sale, which he would have no right to do if he were not the owner, constitutes of itself an acceptance of the goods.

"Even though the appellant had determined to reject the plant, and though its letters to the appellee and its attorneys be regarded as sufficient notice, in writing, of such rejection, it could not retain possession of the property and use it for its own profit in its business and at the same time insist upon the rejection. The two things are utterly inconsistent. While the appellant is actually accepting and using the plant, its words of rejection are unavailing. Where machinery has been bought on approval,

> tried, found defective and unsatisfactory, and notice of rejection has been given, and where, nevertheless, the vendee has continued to use the machinery, such use amounts to a waiver of the right to return the machinery and an election to accept it."

Another case very much in point is the case of Cream City Glass Company v. Friedlander, 84 Wis. page 53. This case involved the sale of certain soda ash to be used in the manufacture of glass. The buyer, upon the arrival of the goods, notified the seller that the goods were rejected for the reason that they did not comply with the specifications of the contract and were not fitted for the manufacture of glass. After the rejection the buyer, in order to test the soda ash, used six tierces of the same to experiment and to test of its fitness for the manufacture of glass. We quote from the decision of the Court as follows:

> "Could the plaintiff, after having decided that the material was wholly unfit, and notified the defendant of its decision and its rejection of the material, proceed to use three-quarters of a ton of the material in making a practical test, and still insist on its right of rejection? It seems clear that the plaintiff was entitled to a reasonable time after actual receipt of the material to exercise the right of rejection in case the goods did not conform to the contract. If this fact could only be ascertained by a practical test, the plaintiff also had the right, within such reasonable time, to make such practical test, using only so much of the material as was reasonably necessary for the purpose, without thereby losing the right of rejection. But this test is plainly for the purpose only

> of enabling the purchaser to decide whether the material conforms to the contract. If the fact can be determined by inspection alone, the test is not necessary, and the use of the material, therefore, clearly unjustifiable. Now in this case the plaintiff's officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need any test. They took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection, if they proposed to insist upon their right to reject. They must do no act which they would have no right to do unless they were owners of the goods. Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant's property, if such rejection was rightful. Plaintiff had no right to use any part of it. * * * The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected and was owned by defendant. It follows that the judgment must be reversed."

In the case of Ackerman v. Santa Rosa-Vallejo Tanning Company, 257 Federal, page 369, this Court used the following language:

> "The delayed acceptance by the buyer of the leather that had been once rejected was a waiver of the defects in the leather, and of contract requirements as to the quality of the merchandise."

To the same effect as the texts and cases above cited is the case of Noble v. Olympic Brewing Company, 117 Pacific, page 241. In said case the brew-

ing company had ordered certain material for the manufacture of barrels. It was delayed in shipment and when the material arrived it was examined by the brewing company and found defective and rejected, and the owner notified. By reason of the extreme needs, however, of the brewing company, it was necessary to use some of the defective material in order to continue its business. It was held that the use of the material after the rejection amounted to a waiver of the defects in quality and that judgment for the value of the goods delivered, against the said company, was proper.

The foregoing authorities are peculiarly applicable to the facts in the case at bar. As has been shown by the testimony heretofore noted, the defendant in this case was protesting very insistently with regard to the quality of the goods, but at the same time was selling the goods as first class to its customers and this continued for a period of over a year. Moreover the goods in question were commingled with other goods belonging to the defendant. These acts were absolutely inconsistent with any claim of rejection. At all times the evidence in this case shows that the acts of this defendant with reference to the goods in question, were acts of ownership and by exercising said acts of ownership over the goods the defendant waived its right to reject the same.

It will undoubtedly be claimed by the defendant, as it was intimated by the trial Court, that it was the duty of the defendant to sell the goods in order

to lessen the damage and in order to obtain as much salvage out of the transaction as possible. The fallacy of this argument lies in the fact that the uncontradicted evidence in this case shows that the goods were not sold by the defendant for the account, or in the name of, Mennillo, but were sold in the ordinary course of business by the defendant to its own customers and trade and without attempting at any time to account to the defendant for the sale of the goods, and further, that the goods in question were commingled with other goods of the defendant.

If the defendant in this case relied upon a rejection and was selling the goods in order to lessen the damage it was the duty of the defendant under the authorities that we have just cited first, to keep the goods separate from any other goods of a similar character belonging to the defendant; second, to sell in the name of the defendant; third, to sell promptly, and fourth, immediately after the sale to account to Mennillo for the proceeds of said sale. The apparent claim of the defendant that it had the right to sell the goods in the ordinary way and if the sale resulted in a profit, that the goods would be accepted, and if the sale of the same resulted in a loss, the defendant could avail itself of a rejection, conforms neither to the law, nor to the sense of justice.

OPINION OF THE TRIAL JUDGE.

In deciding the motion for a new trial, the learned trial judge begins his opinion with the following statement:

> "At the time of the trial I entertained, and I still entertain grave doubts whether testimony is receivable for the purpose of establishing the oral agreement or contract pleaded by the plaintiff. * * * The instant case is a striking illustration of the peril to commercial transaction of recognizing the validity of oral understanding."

To establish that an oral promise to accept a bill of exchange is valid, we cite the following authorities:

Nelson v. First National Bank of Chicago, 48 Ill., page 36,

from which we quote:

> "All cases agree in holding that in order to make a promise of this character binding in favor of a person who has received a bill, the bill must have been taken on the faith of the promise; but where it has been so taken, it is now the settled American law that the promisor must make his promise good."

Willis v. Rich, 80 N. Y. 269,

from which we quote:

> "An oral promise to guarantee payment of a note is binding and without the statute where it amounts to the original obligation of the promisor."

Norton on Bills and Notes, 3rd Edition, page 100,

from which we quote:

> "It is undoubtedly the law that oral acceptances of existing bills are valid and binding acceptances. The reasons given for this rule are much the same as those given for separate acceptances in writing. A verbal promise is treated as an acceptance because of the sound principles of morality that one who promises another although by parol, to accept a particular bill of exchange and thereby induces him to advance his money upon such bill, in reliance upon such promise should be held to make good his promise. The party advances money upon an original promise and upon a valuable consideration and the promisor is bound to carry out his undertaking. Whether it is held to be an acceptance or whether he is subject to damages for breach of his promise to accept, or whether he is held to be estopped from impeaching his word, is a matter of form merely, the result in either case is to compel the promisors to pay the amount of the bill and interest."

To the same effect we also call attention to the following cases:

Scudder v. Bank, 91 U. S. 406;
Sturges v. Bank, 75 Ill. 595;
Dull v. Bircher, 76 Pa. St. 255;
Elliott v. Miller, 8 Misc. 132;
Townsley v. Sumerall, 2 Pet. 170;
Scott v. Pilkington, 15 Abb. Prac. 280;
Williams v. Winans, 14 N. J. Law 339.

But in the case at bar even if the oral promise to accept was absolutely invalid on the ground that the same was not in writing, under the facts in this case the defendant would still be liable thereon on the theory that the contract had been executed on the part of the bank and, therefore, it was removed

from the operation of the statute of frauds. In others words, the evidence shows that the bank, in reliance upon the oral promise, parted from its money and had fully performed all that was required of it to be performed under the contract, and under said circumstances, the defendant, having received the benefit of the contract, could not take advantage of the claim that the promise to accept was invalid on the ground that it was not in writing. We shall only refer to a few of the authorities sustaining this well established principle.

> "A part performance of parol agreement to execute a written lease of land for more than one year takes the agreement out of the operation of the Statute of Frauds."
>
> McCarger v. Rodd, 47 Cal. 138.

> "Parol promise to answer for debt or default of another is valid when executed."
>
> Schultz v. Nobel, 77 Cal. 79.

> "Part performance of contract to erect a building on land of another in consideration of its occupancy for life by the builder takes it out of the operation of the Statute of Frauds."
>
> Manning v. Franklin, 81 Cal. 205 .

> "Part performance of a verbal contract to sell land takes it out of the operation of the Statute of Frauds."
>
> Calanchini v. Branstetter, 84 Cal. 249.

To the same effect we also quote the following:

Bates v. Babcock, 95 Cal. 479;

Hill v. Denn, 121 Cal. 42;

Norris v. Lilly, 147 Cal. 754;

Churchill v. Russell, 148 Cal. 1;
Husheon v. Kelley, 162 Cal. 656;
Bree v. Wheeler, 4 Cal. App. 109;
Mills v. Jackson, 19 Cal. App. 695;
Winkler v. Jerrue, 20 Cal. App. 555;
Heffernon v. Davis, 24 Cal. App. 295.

We therefore submit that an oral promise to accept a bill is valid and that even if it were not valid, the fact that the contract in question was executed in so far as the Bank of Italy was concerned, would make the promise binding even though invalid.

We fail to see the significance of the statement of the Court to the effect that the instant case shows the peril to commercial transactions of recognizing oral understandings. Surely the fact that the Bank of Italy was willing to take the word of Romeo and Co. could in no way have jeopardized the defendant in this case, and we fail to see that any undesirable result could have possibly arisen if the defendant had lived up to its promise. If the observation of the learned trial judge is correct, then the law should be immediately amended that all commercial transactions be evidenced by writing, but it is a matter of common knowledge that out of the multitude of large business transactions which daily take place, very few of them are evidenced by writing.

The learned trial judge in his opinion states, and he instructed the jury, in substance, to the same effect, that, "if the obligation to pay was to be absolute, there was no conceivable reason why

the plaintiff should not have taken Romeo's signature." Our answer to this is that there was a very good and logical reason why Romeo did not want to accept the draft at the time the transaction was consummated in Los Angeles. At said time there was no way for Mr. Romeo to know when the goods would arrive in New York and Mr. Romeo was evidently anxious to have the draft mature at least sixty days after the goods arrived in New York. In all probability Mr. Romeo thought that during said sixty days period the goods would probably be disposed of and the draft met with the proceeds. Had Mr. Romeo accepted the draft on May 2nd, at sixty days' sight, he might have been confronted with the possibility of being called upon to pay the draft before the goods arrived.

VALIDITY OF EXCEPTIONS TO INSTRUCTIONS OF THE COURT.

In settling the bill of exceptions the learned trial judge included the instruction of the Court, but reserved for the decision of this Court whether or not said instructions were properly included in said bill of exceptions. The defendant in this case objected against including in the bill of exceptions the instructions of the Court on the ground that the exceptions taken by plaintiff to said instructions were not sufficient. The following is a summary of the proceedings that were had in the trial of said case having to do with the taking of exceptions to adverse rulings.

"Mr. GORRILL. We object to the admission of the draft because it shows no acceptance by F. Romeo & Co., the drawee, and there is no evidence of any written acceptance of the draft.

The COURT. Overruled.

Mr. GORRILL. May I have an exception to your Honor's ruling?

The COURT. You may have exceptions to all adverse rulings.

Mr. GORRILL. Without specially asking for them every time, your Honor. It will be understood that each side is excepting to adverse rulings without noting them?

The COURT. Yes."

(Reporter's Tr. page 6.)

At the conclusion of the charge to the jury by the Court the following proceedings took place:

"Mr. FERRARI. May I have an exception to the charge, your Honor?

The COURT. You may have the exception, but a general exception will be of no avail to you.

Mr. FERRARI. Well the only part I object to is that portion with reference to the effect of accepting the oral promise, and also——

The COURT. The effect of accepting the oral promise? I don't believe I understand what you mean.

Mr. FERRARI. That portion of the charge that the Court instructed the jury that they should take into consideration the effect of accepting the oral promise——

Mr. TROWBRIDGE. And we would like to have the record show that the jury has gone out, your Honor.

The COURT. Of course they are gone from the box but are in the corridor and I will have them return if you so desire and permit either side to take exceptions. The jurors are still

deemed to be present, and I will recall them if I desire to modify the instructions given.

Mr. TROWBRIDGE. We have no exceptions, your Honor.

The COURT. That is all then."

(Tr. folios 96 and 97, pages 123-124.)

The plaintiff respectfully contends first, that under the stipulation between Court and counsel no exception was necessary to be taken to the charge of the Court, it having been agreed that all adverse rulings would be deemed excepted to and secondly, that even if said stipulation had not been entered into, the exception actually taken was sufficient.

The stipulation in question covered all adverse rulings. Adverse rulings on giving, or failing to give, an instruction was embraced in the stipulation and was as important to the parties as rulings with reference to the rejection or the allowance of testimony. If the counsel or the Court had desired to limit the stipulation simply to ruling made upon objections to testimony, they were at perfect liberty to do so, but as the stipulation that was made did not restrict its operation to any class of objections, a fair interpretation thereof makes the same equally applicable to the instructions of the Court as to the rulings on testimony.

It will be noted that in the statement of the Court and the statement of counsel which made up the stipulation in question, "adverse rulings" are referred to and not adverse rulings on matters having to do with the introduction or rejection of testimony

and under the circumstances where the defendant is endeavoring by a technicality to prevent a review of the instructions of the Court, we submit that the stipulation in question should be liberally construed to the end that the instructions may be included in the bill of exceptions and considered in this proceeding. If the instructions are correct the defendant can suffer no harm. If they are erroneous, the plaintiff will suffer an injustice.

On the second point it appears that plaintiff did take exception to the charge of the Court. The Court stated that a general exception would not avail and the counsel for plaintiff endeavored to specify the objections to the charge, but was interrupted by the Court and counsel for the defendant. While it is undoubtedly true that a general exception to a charge is unavailing, nevertheless in the instant case where the Court gave all the instructions of its own motion, of which neither counsel had a copy, it is hard to conceive how the objections could have been taken in any other manner. Had the usual practice of giving or rejecting the instructions as submitted by the parties been followed, it would have been an easy matter for counsel to have designated the instructions by numbers and excepted either to instructions given or to the failure to give others, but as the instruction was given practically as one instruction, the exception taken is practically all that was possible under the circumstances.

We therefore respectfully submit that the technical objection that the exception taken by plaintiff

was insufficiently stated, in the interests of justice, be overruled and the instructions of the trial Court reviewed in this proceeding.

CRITICISM OF INSTRUCTIONS OF THE TRIAL COURT.

We have heretofore made some criticism of the instructions of the Court set forth in folio 105, page 131 of the transcript. We might add at this time that said instruction, and those that follow it, are subject to the criticism that the Court in calling to the jury's attention matters that they could consider in arriving at a verdict, fails to tell the jury that they should consider primarily the testimony of witnesses that was produced before them. And furthermore, that the instruction was practically an argument to the jury to find in favor of the defendant irrespective of the evidence.

In the next instruction contained in Exception 12, folio 105, page 132 of the transcript, the Court instructs the jury as follows:

> "And I may add, in this connection, that as a circumstance bearing upon the main question as to just what agreement, if any, was had in the bank, you may not improperly consider just what the plaintiff actually parted with."

The Court thereupon proceeds to argue and to instruct the jury as a matter of law and fact in a manner which would lead the jury to believe that in the opinion of the Court the Bank of Italy did not part with anything of value on the strength of this

promise. The matter stated in this instruction was not at issue during the case in any manner. Counsel for the defendant made no such contention during the trial of the case, nor in his argument to the jury. All the evidence in the case clearly, without conflict or contradiction, showed that the bank parted with absolute value.

Testimony of C. R. Mennillo:

> "We were given credit by the bank for $13,-743.63. * * * F. A. Mennillo & Company has never repaid the Bank of Italy for this money. I know the Bank of Italy gave F. A. Mennillo credit for the amount of this draft. I had the bank book and it was entered in said book. I know also from the bank's statement." (Tr. folio 36, page 42.)

Testimony of James O. Moore:

> "I thereupon gave F. A. Mennillo & Co. credit on this transaction and also on the transaction involving the acceptance. In other words, I credited his account with $8,000 and with $5743.63. * * * I left the Bank of Italy on December 13, 1919, and up to that time neither F. A. Mennillo nor F. Romeo & Company had reimbursed the Bank of Italy." (Tr. folio 38, page 45.)

Testimony of James E. Fickett:

> "The records of the Bank of Italy show that it has never received payment for this draft neither from F. Romeo & Company nor from Mr. Mennillo, and that this draft is carried in our suspense account." (Tr. folio 25, page 27.)

Testimony of T. W. Lacy:

> " * * * Mr. Mennillo requested that we deliver the bill of lading on this draft to F. Romeo

& Co., which we did, and we gave R. Mennillo & Company credit for the face value of the draft." (Tr. folio 39, page 46.)

Testimony of F. A. Mennillo:

"I was paid for this shipment through the Bank of Italy; I was paid in currency put to the credit of my account in the same bank in Los Angeles. I don't know if they credited all at one time or at different times, but I got credit for the full amount of the invoice for both cars." (Tr. folio 29, page 33.)

This testimony would have, undoubtedly, been supported by further testimony had counsel for the defendant given any intimation that there was to be any contention that the Bank of Italy had not parted with actual value for the draft, or if the defendant had in any way offered any testimony to controvert this point. This instruction, coming as it did, when the plaintiff could not offer any proof to show that the same was not founded on the evidence, or without any opportunity to argue the matter to the jury, prevented the plaintiff from having a fair and impartial trial on this issue.

The instruction was furthermore subject to the criticism which we made to the previous one, namely, that it told the jury practically to disregard all the testimony on this point and to speculate on what might have been the fact. While the evidence shows, without conflict, that the bank parted with the face value of the draft, it was by no means incumbent upon the plaintiff to have proved consideration to such an extent. If plaintiff gave any consideration

whatsoever for the promise of the defendant to accept the draft, or in any way changed its position, the defendant was bound to fulfill the promise. Besides this, the matter discussed by the Court could only have become an issue if the defendant in this case had pleaded lack of consideration, but the defendant failed to plead in its answer any lack or failure of consideration, nor did the defendant prove, or attempt to prove, that no consideration was given, or in any way dispute or raise an issue with reference to said consideration.

We submit that it is unfair to the plaintiff to have the jury decide this case upon an issue that was not raised by the pleadings and was not involved in the case. If there be any contention on behalf of the defendant that there was a lack or a failure of consideration in this case, the defendant should be permitted to amend its answer and a trial had upon the issue.

The authorities already cited show the error of the Court's instruction to the jury on the question of acceptance. Throughout said instruction (see Tr. folio 105, pages 133-134) the Court seems to be of the opinion that it was only incumbent upon Romeo & Co. to notify Mennillo that the olives were unsatisfactory. In other words, that it was only necessary for the defendant to complain about the condition of the olives. This clearly is not the law. It was the duty of the defendant immediately upon learning of the unsatisfactory condition of the olives to reject the same and after the rejection, not to per-

form any act with reference to said olives consistent with ownership thereof. In light of the undisputed fact that the olives were commingled with those of defendant, were sold to the trade for a period of over a year, the Court should have instructed the jury as a matter of law that the acts of the defendant with reference to the olives amounted to an acceptance and, irrespective of the fact of whether the promise to accept the draft was conditional or unconditional, that the plaintiff was entitled to recover. The Court also failed to take into consideration the fact that if the defendant availed itself of any alleged right of resale for the benefit of Mennillo & Company, that it was incumbent upon the defendant to sell in the name of Mennillo for his benefit, and to account to him for the proceeds. None of these facts are shown by the evidence and the instruction of the Court on this point led the jury to believe that it was perfectly proper for the defendant to have sold these goods in the ordinary course of trade, in its own name, without accounting to Mennillo & Company. For the reasons just stated, therefore, it is respectfully submitted that said instruction was erroneous and highly prejudicial to the rights of the plaintiff.

ADVERSE RULINGS.

The Court sustained an objection to a question propounded to the witness Lacy in which it was attempted to have the witness explain in what sense

the word "accept" was used. This ruling, we claim, clearly violates the well settled principle that a witness has always the right to explain his answer or to explain the meaning that he has attached to any word.

(Tr. folio 102, page 129.)

Objections Numbers II, III, V, VI and X as contained in the Assignment of Errors (see Tr. folios 102-103, pages 129-130-131) all involved the same point. The defendant in this case endeavored to elicit conversations, agreements and contracts with reference to the transaction in question which took place outside of the presence of the plaintiff or any of its representatives. Clearly said conversations, agreements and communications were hearsay and not binding on the plaintiff. For instance, certain of these matters had to do with a conversation between Mennillo and Romeo taking place two days before the transaction in question, and which said conversation the evidence shows was never called to the attention of the Bank of Italy.

A contract between Mennillo and Romeo was also admitted in evidence, as were certain telegrams and communications between F. Romeo and the defendant. To all of said testimony the plaintiff objected upon the ground that it was hearsay and not binding upon the plaintiff, but the Court overruled the objection and an exception was noted.

Had this case been tried before the Court without a jury it is doubtful whether these adverse

rulings would have prejudiced the case in the mind of the judge for the reason that he is experienced in the consideration of evidence and would probably give the said evidence very little weight. But the case at bar was tried before a jury and as we have shown, there was an absolute absence and failure of proof showing that any agreement or understanding was made with the Bank of Italy concerning the conditional nature of the promise to accept. Unquestionably these conversations, hearsay as to the plaintiff, and these contracts and these communications which tended to show that there was an understanding between Mennillo and Romeo to the effect that the payment of the draft was to be conditional, greatly prejudiced the case of the plaintiff and undoubtedly served to supply, in the minds of the jury, the evidence that was lacking in the record to prove the conditional nature of the promise.

MOTION FOR A NEW TRIAL.

Plaintiff in this case within the time allowed by law, interposed a motion for a new trial in the above entitled action, urging the same points which are set forth in this brief, and we submit that upon all the grounds heretofore alleged, the said motion for a new trial should have been granted, and that in the denial of said motion for a new trial, the said District Court committed prejudicial error.

CONCLUSION.

Wherefore the Bank of Italy, plaintiff in error, prays that the judgment of said District Court be reversed for the reasons hereinbefore set forth.

Dated, San Francisco,
February 11, 1922.

LOUIS FERRARI,
Attorney for Plaintiff in Error.

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No. 3804

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF ITALY (a corporation),
Plaintiff in Error,

vs.

F. ROMEO & CO., INC. (a corporation),
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

O. K. CUSHING,
CHARLES S. CUSHING,
WILLIAM H. GORRILL,
DELGER TROWBRIDGE,
Attorneys for Defendant in Error.

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BRIEF FOR DEFENDANT IN ERROR.

Introductory Statement.

The judgment appealed from in this case is in an action for damages for the alleged breach of an alleged oral promise to pay a certain draft upon maturity wherein the defendant was absolved from liability.

We are somewhat embarrassed in defending this writ of error, because the plaintiff in error has proceeded very informally and has disregarded many important rules of procedure and practice governing the trial of cases and the prosecution of writs of error designed for the protection of courts and the rights of parties. The two main contentions of the plaintiff in error are that the evidence

is insufficient to justify the verdict in favor of the defendant F. Romeo & Co., Inc., and that the court committed error in the instructions which it gave to the jury. Neither of these contentions can be presented on this writ of error because the proper procedure for presenting them to this court was not followed. There was never any request made to the trial court by plaintiff in error to withdraw the case from the jury, or to direct a verdict in its favor, which makes it impossible for this court to consider the first contention, nor were any exceptions taken to the instructions to the jury except one which is unimportant. We will demonstrate the insufficiency of the record in these two respects more in detail in the body of our brief.

We are embarrassed also in replying to the brief of plaintiff in error because it does not comply with rule 24 of this court. There is no "precise abstract or statement of the case", nor is there "a specification of the errors relied upon" in accordance with rule 24. It will be necessary for us to supply below the statement of the case which plaintiff in error has neglected to furnish.

Statement of the Case.

During the year 1918 one F. A. Mennillo entered into a written contract to sell a large amount of Greek style and ripe olives to the defendant in error, shipment to be made after approval of samples by representative of defendant in error (Record, p. 48).

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During the year 1918 one F. A. Mennillo entered into a written contract to sell a large amount of Greek style and ripe olives to the defendant in error, shipment to be made after approval of samples by representative of defendant in error (Record, p. 48).

During April, 1919, F. A. Mennillo shipped two carloads without submitting any samples to defendant in error. He then applied to F. Romeo, the representative of defendant in error, for payment, which was refused because the goods had not been examined and because the previous shipment had not been satisfactory in quality. It was finally agreed that the defendant in error would pay $8000 and that a draft for the balance of the invoice price ($5743.63) was to be accepted by the defendant in error in New York after examination of the olives upon arrival if found to be satisfactory (Record, p. 50).

The plaintiff in error had all the stock of olives of F. A. Mennillo in pledge (Record, p. 42), and to enable F. A. Mennillo to deliver the two carloads of olives to the defendant in error, arrangements had to be made by him with the plaintiff in error. Accordingly defendant in error on May 2, 1919, paid $8000 on account of the invoice price of the two cars of olives (which amounted to $13,743.63) and at the same time Mennillo, through his attorney in fact, drew a draft in his own favor on defendant in error for the balance of the invoice price, and indorsed this draft to the Bank of Italy, which thereupon surrendered the bills of lading (Record, pp. 41-42). There is a direct conflict in the evidence as to the nature of the obligation of defendant in error, if any, to accept this draft so drawn against it. Defendant in error proved, however, that its president agreed with F. A. Mennillo's agent to

accept the draft sued on after the goods arrived in New York, but only on condition that examination of the olives by the defendant in error after their arrival showed that they were of satisfactory quality (Record, pp. 50-51). This agreement was repeated in the presence of Mr. Moore, who represented the plaintiff in error in this transaction at the time the draft was delivered to the plaintiff in error (Record, p. 65). After the defendant in error paid the $8000 and F. A. Mennillo's agent drew and delivered the draft for $5743.63 to plaintiff in error, the latter released the bills of lading for the two carloads of olives (Record, p. 45) which thereafter went forward to defendant in error. The two carloads of olives arrived in New York City about May 21, 1919 (Record, pp. 82, 83). Examination of the olives by defendant in error proved them to be seriously defective, which is not denied by plaintiff in error. As soon as this was discovered defendant in error telegraphed F. A. Mennillo stating that the olives were defective in quality and requesting that he appoint an agent to examine them (Defendant's Exhibit B). F. A. Mennillo did not do this and did not in any other way offer to settle the matter or to receive back the olives. Finally after several weeks of correspondence (Defendant's Exhibits C, D, E, F and G) defendant in error advised F. A. Mennillo that the olives would be sold and that F. A. Mennillo would be held for damages for breach of warranty (Defendant's Exhibit H). The olives were sold by de-

fendant in error in the usual course of trade and it was stipulated at the trial that the selling of these olives did not realize enough to repay defendant in error the $8,000 it paid to plaintiff in error on May 2, 1919 (Record, p. 111).

I.

ANSWERING PLAINTIFF IN ERROR'S CONTENTION THAT THERE IS NO EVIDENCE TO JUSTIFY THE VERDICT.

(a) Plaintiff in error is not entitled to contend that there is no evidence to justify the verdict.

Plaintiff in error devotes the major portion of its brief to its contention that there is no evidence to justify the verdict in behalf of the defendant F. Romeo & Co., Inc., its discussion of this point being found on pages 4 to 29, both inclusive. But plaintiff in error is unable to contend in this court that there is no evidence to justify the verdict, because plaintiff in error at no time requested the trial court to withdraw the case from the jury, and it is a well-settled principle of the law of appeal and error that plaintiff in error cannot complain that there is no evidence to sustain the verdict unless he requested the trial court to take the case from the jury. Plaintiff in error at the close of the defendant's case did not move the court for a verdict in its favor, nor did plaintiff in error request the court to instruct the jury to render a verdict in its favor, nor did the plaintiff in error in any other manner request the trial court to take the case from the

jury on the ground that there was no evidence justifying the submission of the case to the jury. This rule is more than a technical rule of procedure, but was established for the guidance and protection of the trial court and of the parties. It is not fair to the trial court not to give it an opportunity to withdraw the case from the jury where the evidence is insufficient to justify the submission of the case to the jury, nor is it fair to the party prevailing below not to give him an opportunity to present additional proof if he has not made a case sufficient to present to the jury. The rule is the same whether a case is tried before a jury, or whether a jury is waived. In either event, a party who claims to be entitled to a judgment as a matter of law must make that contention in the trial court in order to preserve his right to make that claim in the appellate court. The authorities in this circuit are as follows:

Pennsylvania Casualty Company v. Whiteway, 210 Fed. 782, at 784; where the court said:

"When an action at law is tried before a jury, their verdict is not subject to review unless there is absence of substantial evidence to sustain it, and even then it is not reviewable unless a request has been made for a peremptory instruction, and an exception taken to the ruling of the court",

Brolaski v. United States, filed February 13, 1922, and not yet reported,

and

Pabst Brewing Co. v. E. Clemens Horst Co., 264 Fed. 909, at 911, and cases cited.

Cases from other circuits to the same effect are as follows:

Sun Publishing Co. v. Lake Erie Co., 157 Fed. 80;

City of Lincoln v. Sun Vapor Co., 59 Fed. 756;

Mexico Land Co. v. Larkin, 195 Fed. 495;

Wear v. Imperial Window Glass Co., 224 Fed. 60;

U. S. Fidelity & Guaranty Co. v. Board of Commissioners, 145 Fed. 144, at 151;

Royce v. Delaware Lackawanna etc. Ry Co., 203 Fed. 467.

Furthermore no exception was taken to the verdict (Record, p. 124) and the bill of exceptions does not contain any specifications of insufficiency of the evidence to justify the verdict. It is well settled that both these steps must be taken to enable the plaintiff in error to complain of the submission of the case to the jury.

California Code of Civil Procedure, section 648;

Matter of Baker, 153 Cal. 537, at 542;

Estate of Behrens, 130 Cal. 416, 418;

Winterburn v. Chambers, 91 Cal. 170, 185.

A further defect in the record is that in the assignment of errors in this case there are no specifications of the insufficiency of the evidence to justify the verdict.

It has been held in this circuit that the assignment of errors must specifically state wherein the evi-

dence is insufficient to justify the submission of the case to the jury. It is true that the plaintiff in error did make the following assignments of error:

> "14. In failing to instruct the jury to find in favor of the plaintiff."
> "15. In entering judgment against the plaintiff on the verdict of the jury."
>
> (Record, page 135.)

It has been held, however, that such a general assignment of error is insufficient to enable the appellate court to consider the insufficiency of the evidence. This rule is well stated in *Doe v. Waterloo Mining Co.,* 70 Fed. 455, at 461, decided by this court in 1895. The language of the court on this point is as follows:

> "Rule 11 of this court requires that the assignments of error shall be separately and particularly set out. The object of setting forth assignments of error is to apprise the opposite counsel and the court of the particular legal points relied upon for a reversal of the judgment of the trial court. The attempt to make the assignments of error more particular in a brief is not proper. It is in fact an attempt to amend the record in this particular without permission of court. The assignment of error in question reads as follows: 'There is error in said decree, in this: that said court, upon the whole evidence, should have rendered a decree in favor of the complaint.' This is too general. There is no specification showing wherein the decree is not supported by the evidence. It is not correct that the seven additional assignments of error are specifications under this assignment."

(b) The evidence fully supports the verdict.

While we are satisfied that the plaintiff in error has not the right to complain that the case should not have been submitted to the jury because he in no way presented the point to the trial court, it is submitted that there was abundant evidence to justify the verdict of the jury in favor of the defendant in error. Plaintiff in error contends that the evidence was insufficient to justify the verdict in two respects: The first of these is that the jury in effect found that the promise of the defendant F. Romeo & Co., Inc., to accept the draft was conditional. The following excerpts from the testimony of the defendant F. Romeo show without doubt that the promise to accept the draft was conditional and that the plaintiff in error was so informed more than once. Defendant F. Romeo met the drawer of the draft, who was the seller's representative, at his hotel a short while before the defendant F. Romeo and the drawer of the draft went to the office of the plaintiff in error. Defendant F. Romeo testified as follows, in regard to the understanding between himself and the drawer of the draft, entered into at the hotel:

> "A. It was understood that all the olives before shipping should have been approved by myself and when that shipment was not examined, I objected to taking that shipment. Then he invited me to make some proposition. I offered him about 50 per cent of the invoice because the previous shipment of olives was not satisfactory in quality and then we agreed that I was going to pay $8000, and *the balance was*

to be conditioned on accepting a draft in New York after the examination and approval of the quality of the olives."

"That conversation took place in the Clark Hotel, Los Angeles, where I was living at that time" (Record, p. 50).

Defendant F. Romeo then went to the office of plaintiff in error with Mr. C. R. Mennillo, the agent of F. A. Mennillo, and F. Romeo stated what occurred there in the following words: "We went to the bank on May 2nd and there I told Mr. Moore the same arrangement that I had made with Mr. Mennillo" (Record, p. 51). Mr. Moore at that time was the assistant manager of the plaintiff in error in Los Angeles, who handled the transaction in question for the plaintiff in error (Record, p. 44).

Plaintiff in error contends that F. Romeo did not tell the plaintiff in error that the agreement to accept the draft was conditional and in support of this contention quotes from the cross-examination of F. Romeo. The examination of this witness, however, conclusively shows that this witness positively stated to Mr. Moore, representing the plaintiff in error, that the agreement to accept the draft was conditional on the quality of the olives being found to be satisfactory on examination of the goods after their arrival in New York. The testimony of F. Romeo regarding the conversation with Mr. Moore at the office of plaintiff in error is as follows:

"Q. But it is quite possible, Mr. Romeo, that you did not specifically make that condi-

tional statement, namely, that the draft would only be accepted in case the goods met with your approval, in the bank?

A. *That was understood, Mr. Moore knew that.*

Q. You say he knew that. You had never talked to Moore about it?

A. *Well, I stayed there about half an hour in the bank, and we were talking about this transaction.*

Q. But you have no independent recollection of making that statement to Mr. Moore, that you say was made in the conversation between you and Mr. Mennillo?

A. Well, if I had promised to accept it on that condition, I would except that I would.

Q. That is not an answer to the question. You are not positive, as you have just stated?

A. *I think we had the conversation, otherwise Mr. Moore would not have accepted the draft."*

(Record, p. 58.)

"A. *It was distinctly understood that I was paying $8000 and that we intended to assume no more obligation on that shipment until the goods were examined in New York."*

(Record, p. 59.)

This testimony of Mr. Romeo is reinforced by similar testimony on his re-direct examination, where he stated as follows:

"While we were at the Bank of Italy, Mr. Mennillo said we had to draw on my firm for the balance of the invoice at 60 days' sight. *The draft was to be accepted after examination and approval of the quality of the olives—that was said in Mr. Moore's presence."*

(Record, p. 65.)

The other claim of insufficiency of evidence to justify the verdict is that there is no evidence showing that defendant F. Romeo Co., Inc., rejected the olives shipped to it by the drawer of the draft. The record shows that Mr. Joseph Lodato, who was an employee of the defendant in error, stated that the olives involved in this sale arrived in New York City about May 21st or May 22nd, 1919, and that the olives were brought to the store of the defendant in error within two days after their arrival and were there inspected immediately (Lodato's deposition, p. 77). The testimony shows without contradiction that the olives were of a defective quality. Indeed this is not disputed in the brief of the plaintiff in error. The olives were sold by the defendant in error under circumstances which will be hereafter stated in detail. It was stipulated at the trial that the sale of the olives realized less money than the $8000.00 advanced by the defendant in error, so that instead of there being any money to turn over to the seller of the olives, the defendant in error sustained a loss as a result of the transaction (Record, p. 111). In other words, there was a loss even leaving out of consideration the alleged liability of the defendant in error under the draft in question. The facts relating to the rejection of the olives may be briefly stated as follows:

On May 23, 1919, F. Romeo & Co., Inc., telegraphed F. A. Mennillo of Los Angeles advising him of the condition of the olives and requesting F. A. Mennillo to "please appoint somebody to verify

our claim" (Defendant's Exhibit B). On May 24, 1919, F. A. Mennillo telegraphed F. Romeo & Co., Inc., that its claim was without foundation, but stated that without prejudice to the terms of the contract under which the goods were shipped his brother would call on F. Romeo & Co., Inc., on unofficial inspection (Defendant's Exhibit C). On Juné 4, 1919, F. Romeo & Co., Inc., again wired F. A. Mennillo advising him of its claim, and in conclusion said, "We now have two cars ripe and one car green olives rejected. Give us disposition at once" (Defendant's Exhibit D). On June 5th F. A. Mennillo replied that the position taken by him in his letter of May 29th was absolutely correct (Defendant's Exhibit E). On June 10th F. Romeo & Co., Inc., wired F. A. Mennillo suggesting that they submit the matter to arbitration, F. A. Mennillo to agree to be bound by the arbitration (Defendant's Exhibit F). On June 13th F. Romeo & Co., Inc., wired F. A. Mennillo again suggesting that the matter be submitted to experts for arbitration, each to be bound by their decision (Defendant's Exhibit G). On July 9th F. Romeo & Co., Inc., wired F. A. Mennillo that the two cars of ripe olives would "be sold to best advantage and we will hold you in damages for breach of warranty" (Defendant's Exhibit H). On July 10th Mr. Mennillo wired F. Romeo & Co., Inc., that he had nothing to add to his previous correspondence on this subject (Defendant's Exhibit I). It will be seen from this that F. A. Mennillo was fully advised of the claim

of F. Romeo & Co., Inc., that the olives were defective and F. A. Mennillo was given every opportunity to investigate the merits of the claim either by examining the olives or by submitting the olives to examination by experts as arbitrators. Finally the patience of F. Romeo & Co., Inc., was exhausted and it advised F. A. Mennillo, as it had the legal right to do, that it would sell the olives and hold F. A. Mennillo liable in damages for the breach of the warranty of the quality of the olives. This last telegram was more than six weeks after the first telegram to F. A. Mennillo, advising him of the defective condition of the olives and the claim of F. Romeo & Co., Inc.

Mr. Francisco Romeo also testified that his firm had rejected the olives for which the draft in question was drawn. He stated that:

> "After the olives arrived in New York they were examined by me and by other members of our firm. I did not leave them at the railroad station. They were in our store. They were there at the time they were examined; that was the understanding. We never redelivered them to the railroad station; we offered them to Mr. Mennillo if we got our money back; we held the olives subject to his orders. The correspondence will show that. There ought to be correspondence showing that we advised Mr. Mennillo that we held the olives subject to his order." (Record, pp. 58-59.)

We submit that the jury could come to no other conclusion than that the defendant in error had absolutely rejected the olives and rescinded the sale.

Counsel for plaintiff in error misapprehends the law when he asserts that defendant in error accepted the olives by selling them; for it is perfectly clear that the defendant in error was simply following the provisions of the Uniform Sales Act, in force in New York at the time the sale was made, and was foreclosing the lien given it by the Sales Act when it sold the olives. That this court will take judicial notice of the statutes of every state in the union including those of the State of New York is well settled.

23 C. J., 127, Section 1945;
Lamar v. Micou, 114 U. S. 218, 223; 29 L. Ed. 94;
Pennington v. Gibson, 16 How. 65, 81; 14 L. Ed. 847;
Southern Pacific Co. v. DeValle Da Costa, 190 Fed. 689, 697;
Varcoe v. Lee, 180 Cal. 338, 343.

The original contract of sale of the olives was made in the State of New York and under the notification thereof relating to these two car loads, New York was the state for the performance of the contract since the olives were to be shipped thither and examined there on arrival. Furthermore the domicile of the purchaser of the olives was in New York and that was where the olives were situated when they were examined and defendant in error objected to their quality. In view of these facts it is clear that the law in force in the State of New York

would govern the rights and remedies of the defendant in error arising from the breach of the contract as to the quality of the olives.

Section 69 of the Uniform Sales Act, found in Section 150 of the Personal Property Law of New York (L. 1911, Ch. 571), Subdivision (d) provides as follows:

> "Where there is a breach of warranty by the seller, the buyer may, at his election rescind the contract to sell, or the sale, and refuse to receive the goods, or if the goods have already been received, return them or offer to return them, to the seller and recover the price or any part thereof which has been paid."

Subdivision (5) of the same section provides:

> "Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by Section 53."

Section 53 of the Sales Act (Section 134 Personal Property Law of New York, L. 1911, Ch. 571) gives the right of resale as defined by the Sales Act.

Section 60 of the Sales Act (Section 141 of the Personal Property Law of New York, L. 1911, Ch. 571) provides that in making the resale only reasonable care and judgment need be exercised and that the resale may be made either by public or private sale; also that notice of the resale need not be given.

The evidence shows that defendant in error resold the olives in the manner provided by the Uniform Sales Act.

In this case F. A. Mennillo was advised that a resale of the goods would be made by the defendant in error after Mennillo failed to take back the olives or arbitrate the dispute, and there is no contention made by plaintiff in error, nor could there be, that the sale was not fairly made and for the highest possible market price. The plaintiff in error claims that there was an acceptance of the goods by reason of the commingling of the olives with those of the stock of defendant in error, but plaintiff in error can point to no testimony to prove this. The facts were that the ripe olives were commingled, not with other property of the defendant in error, but with another shipment of olives from the seller (Exhibit N) which were of the same size, style and defective condition *and similarly rejected;* but these two shipments were kept entirely separate and apart from the stock of F. Romeo & Co., Inc. Furthermore, when these olives were sold, a separate account was kept of the proceeds of the sale and no complaint has been made as to the division of the proceeds between the two shipments. The following testimony of Giovanni F. Romeo is conclusive on this subject:

> "I made an examination of that carload upon arrival and found the olives to be *in the same condition* as the previous car of ripe olives. *The olives covered by Exhibits 'N' and 'L' are the same size and style of olives.* After arrival, the carload of ripe olives covered by Defend-

> ant's Exhibit 'L' was set aside, that is they were placed in one corner of the warehouse and orders were given that they were not to be sold until instructions from the office. The same was done with the olives shipped under Exhibit 'N'. By that I mean that they were set aside and orders were given that they be not sold until instructions were issued to that effect, and they were so set aside. The olives under Exhibits 'L' and 'N' were commingled and there were no identifying marks whereby we could subsequently tell the olives of one shipment from those of another. *These olives were subsequently sold and we kept a separate account of these two lots; it would have been very difficult to keep these two accounts separate because of the limited space in the store.*" (Record, pp. 86-87.)

Plaintiff in error seeks also to give the impression that two different kinds of olives were commingled by defendant in error, namely, Greek style olives and ripe olives, which was not the case however. On page 17 of its brief, plaintiff in error states: "Fourth, that after examination the goods were commingled with other goods and carried in the general stock of the defendant"; and at page 18 of its brief, second paragraph, plaintiff in error quotes testimony showing that defendant in error showed some *Greek style* olives to customers and brokers; but there is no evidence whatever that the Greek style olives were commingled either with the ripe olives from Mennillo or with the stock of defendant in error. The evidence quoted at the bottom of page 17 of the same brief, shows that the olives that were commingled were the two cars of

ripe olives covered by Exhibits "L" and "N", and it also appears clearly from the testimony of Giovanni F. Romeo (at pages 86 and 87 of the Record) that the olives covered by Exhibits "L" and "N" were ripe olives and that the Greek style olives were covered by Exhibit "K". We have already shown that the two cars of ripe olives were kept separate from the stock of defendant in error and *not* commingled with it.

But even if we should assume for the sake of argument that the defendant in error accepted the olives, it is clear that it did not at any time waive their defective quality, but on the contrary at all times protested their quality, and in its final telegram to Mennillo of July 9th, 1919, stated it would hold him for damages. The plaintiff in error therefore failed to show a fulfillment of the condition attached to the promise to accept the draft; for there was neither approval of the olives nor waiver of approval. The verdict of the jury established that the promise of the defendant in error to accept the draft was so conditioned.

Plaintiff in error contends (Brief, p. 20) that

> "not a single word of protest was sent to the Bank of Italy concerning the character of the goods nor was there ever an attempt made by the defendant to render an account to the Bank of Italy."

The following extracts from the record sufficiently answer these claims:

Joseph Lodato, assistant treasurer of the defendant in error, testified as follows:

> "A draft was presented to me by the East River National Bank *for the Bank of Italy,* a copy of which draft is set out in paragraph five of the complaint; * * * I do not keep the memorandums. When the draft was first presented to me that day, I do not remember whether any memorandum was attached to it; *I told the messenger that we would not accept the draft, as we did not find the goods satisfactory.* The messenger then went back to the bank." (Italics ours.)
>
> (Record, pp. 29-30.)

Extract from testimony of F. Romeo, president of defendant in error:

> *"We wanted to submit an account for the sale of these olives to the Bank of Italy and they did not want to accept that.* We never did submit any account to the Bank of Italy for the sale of these olives. We had nothing to do with the Bank of Italy; we notified Mennillo that we kept the goods subject to his order, and unless he gave disposition we were going to sell for his account." (Italics ours.)
>
> (Record, p. 61.)

The authorities cited and quoted from on pages 22 to 28 of brief of plaintiff in error are not applicable to the facts in this case, which, as before shown, comprise a rejection of the goods and a notification that they would be sold for Mennillo's account.

II.

PLAINTIFF IN ERROR HAS NO RIGHT TO ATTACK THE INSTRUCTIONS TO THE JURY BECAUSE IT DID NOT EXCEPT TO THEM.

The second of the two main points urged by plaintiff in error on this appeal is that the instructions of the court to the jury were prejudicially erroneous. Plaintiff in error discusses the instructions on pages 30 to 34, and 38 to 42 of its brief. In discussing these instructions, plaintiff in error necessarily went outside of the record, because the bill of exceptions as settled by the trial court contains no exceptions to the instructions, except a general exception and the following attempted exception, which we claim is so vague and indefinite as not to constitute a proper exception. The general exception has, of course, no effect. The only attempt at a specific exception consists of the following:

> "Well the only part I object to is the portion with reference to the effect of accepting the oral promise * * * that portion of the charge that the court instructed the jury that they should take into consideration the effect of accepting the oral promise."

Rule 10 of this court is as follows:

> "The judges of the district courts shall not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law, upon any general exception to the whole of such charge. But the party excepting shall be required to state distinctly the several matters of law in such charge to which he excepts, and those matters of law, and those only, shall be inserted in the bill of exceptions and allowed by the court."

The rule of the District Court for the Northern District of California with regard to exceptions to instructions to a jury is as follows:

> "91. *Exceptions to a charge.* Exceptions to a charge to a jury, or to a refusal to give as a part of such charge instructions requested in writing, may be taken by any party by stating to the court before the jury have retired, that such party excepts to the same, specifying by numbers of paragraphs or in any other convenient manner the parts of the charge excepted to, and the requested instructions the refusal to give which is excepted to, and specifying the grounds of such exceptions. As to the charge given by the court of its own motion, the grounds of exception shall be specific; as to instructions requested by the parties the grounds may be general. The judge shall note such exceptions in the minutes of the trial or cause the reporter (if one is in attendance) so to note the same. If, after the jury have retired to deliberate upon their verdict, they return into court and request further instructions, the court may, in the absence of counsel, give such instructions, and such instructions shall be deemed excepted to by each party."

As stated by plaintiff in error, the entire charge was given upon the court's own motion.

Furthermore the foregoing single attempt to take a specific exception was unfair in that counsel for plaintiff in error said that the court instructed the jury "that they *should* take into consideration the effect of accepting the oral promise". The substance of the court's charge on this point was that they *might* take this into consideration. The language of the court on this point was as follows:

> "If the plaintiff was going to pay out over five thousand dollars on this draft, and if as a condition to doing that, it was requiring the defendant to make an absolutely unconditional promise to pay, you may properly ask whether it is or is not probable that it would have taken an oral promise; or would it have required a written acceptance? In balancing the probabilities and improbabilities on this point, you may consider the admitted fact that at the very time the defendant's president was present at the bank, and according to the plaintiff's evidence, was authorized to enter into a formal written acceptance: and further,—if you believe the plaintiff's testimony—that the draft was there made out, and of course it could have been endorsed was a written acceptance forthwith and without very much trouble."
>
> (P. 118, Trans. of Record.)

This instruction is so fair that we are surprised at the criticism it has evoked. The trial judge did not in any way intimate an opinion as to whether he believed an oral unconditional promise to accept the draft in question had been made or not. He simply pointed out the various factors that the jury might consider without, however, suggesting what his personal opinion was.

The authorities are uniform to the effect that such comment on the evidence is perfectly proper.

The rule governing the giving of instructions in the federal courts is well stated in 14 Ruling Case Law 743, as follows:

> "While the province of the court and the jury is quite distinct in the federal courts, it is the right and duty of the court to aid the jury

> by recalling the testimony to their recollection, by collating its details, by suggesting grounds of preference where there is contradiction, by directing their attention to the most important facts, by eliminating the true points of inquiry, by resolving the evidence, however complicated, into its simplest elements, and by showing the bearing of its several parts and their combined effect stripped of every consideration which might otherwise mislead or confuse them. How this duty shall be performed depends in every case upon the discretion of the judge."

Among the authorities applying this rule are:

Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568, 574; 34 L. ed. 784, 787;

Simmons v. United States, 142 U. S. 148, 155; 35 L. ed. 968, 971;

United States v. Philadelphia & R. R. R. Co., 123 U. S. 113, 114; 31 L. ed. 138, 139.

As to the other criticisms of the instructions made by the plaintiff in error, while we believe them to have been absolutely fair and proper in every respect, we will not trespass on the time of this court by discussing them, because any such discussion would involve matters outside of the record. It is elementary that the plaintiff in error can only complain of those matters that are contained in a bill of exceptions, and there being no other exceptions to the instructions in the record, there is nothing further for us to discuss. The bill of exceptions is, of course, conclusive as to what took place at the trial. See:

Moss v. Gulf Compress Co., 202 Fed. 657.

The Supreme Court of the United States has recently held that it will not even consider an admission of counsel as to the proceedings which is contrary to the account of the proceedings in the bill of exceptions. See the recent case of *Guerini Stone Co. v. Carlin Construction Co.,* 248 U. S. 334, at 342; 63 L. Ed. 275, at 284.

We resent the suggestion that there was any stipulation preventing us from objecting to the lack of exceptions to the instructions. Plaintiff in error has no right to quote the matter set forth on page 35 of its brief, purporting to be from page 6 of the reporter's transcript, because it does not appear in the bill of exceptions nor anywhere else in the record. What actually occurred with regard to the taking of exceptions is stated in the opinion of the learned trial judge regarding the settlement of the bill of exceptions as follows:

> "Touching the instructions to the jury, I have corrected the proposed bill to make it speak truly. The exceptions interpolated in the proposed bill were not in fact taken; that is conceded. Counsel for the plaintiff seeks to justify their insertion now by invoking a statement made from the bench early in the trial that 'all adverse rulings would be deemed to be excepted to'. But this was intended only for rulings upon the admission and exclusion of evidence. * * * The statement here relied upon from the bench has been made by the writer in a great number of cases, covering a period of many years, and now for the first time the suggestion is made that it should be regarded as relieving attorneys from the necessity of particularizing their exceptions to in-

structions. It is difficult to believe that counsel here could have so understood at the time. Such a meaning would imply an intent on the part of the presiding judge not only to set aside a standing rule of the district, but to transcend a standing rule of the appellate court. But it conclusively appears that such was not the understanding at the time. Counsel did not rely upon such a theory, but immediately after the instructions were given he undertook expressly to take exceptions. Such action would have been wholly unnecessary if the subject was understood to be covered by the statement now relied upon. But even if he had had such an understanding, he was at the time expressly advised that, to be of any avail to him, his exceptions to the instructions must be specific and particular; whereupon there was an attempt at specifications, such as the foregoing record shows."

(Trans. of Record, pp. 124, 125 and 126.)

From this full explanation of the trial judge it appears conclusively that there was no stipulation between the parties as to "adverse rulings"; that the statement by the court that all "adverse rulings would be deemed to be excepted to", did not apply to instructions given and refused; and that counsel for plaintiff in error was fairly warned by the lower court that his attempted exception to the charge was insufficient and that it would recall the jury if counsel desired to take further exceptions to the instructions.

Concerning the attempted exception to the bill of exceptions, it will also be noted that counsel for

plaintiff in error made no remarks at all about the instructions until after the jury had retired (Trans. of Record, page 123). It is well established and has been recently held in this circuit that exceptions to the instructions to a jury must be taken while the jury is still at the bar (see *Miller & Lux Inc. v. Petrocelli,* 236 Fed. 846). The statement of the trial judge in his opinion settling the bill of exceptions that the jury was in the hall while counsel for plaintiff in error attempted to take exceptions and was considered by the court as still being at the bar can, of course, not alter the legal effect of the situation. It will be noted from the record that the trial court said:

> "Of course they (the jury) are gone from the box, but are in the corridor and I will have them return if you so desire and permit either side to take exceptions." (Trans., page 124.)

Counsel for plaintiff in error did not request the return of the jury, and the jury did not return, so that the fact remains that any exception he attempted to take was not taken in the presence of the jury.

III.

DISCUSSION OF VARIOUS ADVERSE RULINGS COMPLAINED OF BY PLAINTIFF IN ERROR.

Plaintiff in error on pages 42-44 of its brief complains of various rulings as to the admission and rejection of evidence which we will take up in the

order mentioned in the brief of the plaintiff in error.

1. Plaintiff in error complains of the court sustaining an objection to the question propounded to the witness Lacy and refers to page 129 of the Transcript of Record for the ruling complained of. This is the first assignment of error in the assignment of errors.

We have examined all of Mr. Lacy's testimony as set forth in the bill of exceptions at pages 46 and 47 of the record but we do not find any ruling or exception in the record regarding the matter set forth in the Assignment of Errors so we need not discuss this assignment of error. Assuming, however, that the ruling complained of were found in the bill of exceptions it is obvious that counsel for plaintiff in error was asking the witness Lacy for a conclusion of law, which is never admissible in evidence.

2. Plaintiff in error referring to Assignment of Error II next objects to the admission in evidence of the contract of sale of the olives by F. A. Mennillo to the defendant in error, contending in its brief that this contract was hearsay and not binding on the plaintiff in error. This contract was testified to by Mr. F. A. Mennillo, whose testimony was introduced on behalf of the plaintiff (Record, p. 32). Inasmuch as Mr. F. A. Mennillo testified at some length concerning the contract in question on his direct examination conducted by the counsel

for the plaintiff in error, there is no doubt but that defendant in error had a perfect right to introduce the original contract in evidence to show exactly what the contract provided. Furthermore the entire rebuttal of the plaintiff in error consisted of the introduction in evidence of the provisions of the contract appearing on the back thereof (Record, p. 113).

3. The next ruling complained of by plaintiff in error referring to Assignment of Error III is stated in the assignment of errors as follows:

> "In overruling the objection of plaintiff to the testimony of F. Mennillo in regard to the contract between Mennillo and F. Romeo & Co." (Record, pp. 129-130.)

This must be a mistake on the part of the plaintiff in error; for it is an objection to testimony introduced by itself. The testimony of F. A. Mennillo was introduced on behalf of the plaintiff in error (Record, p. 31). Furthermore the bill of exceptions (Record, pp. 31-40) does not show any objection or exception to any ruling on the testimony of F. A. Mennillo.

4. The next ruling complained of (covered by Assignment of Error V) is the admission in evidence of the letter dated May 2, 1919, from F. Romeo to F. Romeo & Co., Inc., known as defendant's Exhibit "B". Plaintiff in error on the cross-examination of witness F. Romeo asked him whether he had reported all that occurred with

regard to the particular shipment of olives involved in the transactions at the Bank of Italy on May 2, 1919. In answer to this question the witness F. Romeo testified as follows:

> "I reported everything that transpired with reference to this particular shipment made by Mennillo and which was paid for by that draft of $8000 on May 2nd; I reported all this to my office and there was no disapproval of what I had done." (Record, p. 62.)

Defendant's Exhibit "B", was simply a written report by Mr. F. Romeo to defendant in error of the modification of the contract with F. A. Mennillo concerning the method of paying for this shipment of olives negotiated at the office of the plaintiff in error. It requires no argument to show that defendant in error had a perfect right to introduce the report in evidence which plaintiff in error cross-examined the witness F. Romeo about.

5. The next error, assigned as VI in the assignment of errors, complains of the admission in evidence of a telegram from F. Romeo to the defendant in error dated April 29, 1919, known as defendant's Exhibit "C". While defendant's Exhibit "C" was objected to counsel for plaintiff in error did not give any ground for the objection (Record, p. 63) and it is well settled that an objection without any ground cannot be relied upon on appeal.

Toplitz v. Hedden, 146 U. S. 252, 255; 36 L. ed. 961, 962;

Pennsylvania Co. v. Clark, 266 Fed. 182, 187.

Furthermore this telegram advised the defendant in error of F. Romeo's negotiations with F. A. Mennillo's agent. Plaintiff in error on cross-examination asked the witness F. Romeo whether he kept his office informed as to the different moves he was making (Record, p. 62). Therefore defendant in error had a right to show exactly what information F. Romeo sent to his office regarding his negotiations with Mr. Mennillo's agent.

6. The last assignment of error relied on, X, complains of the introduction in evidence of certain testimony of Marie J. Romeo. In this case also plaintiff in error merely objected to the question calling for the conversation between F. Romeo and C. R. Mennillo without specifying any ground for its objection. This ruling cannot therefore be reviewed on appeal. Assuming that the plaintiff has a right to review this ruling, the introduction in evidence of this conversation was perfectly proper since the conversation referred to the modification of the contract of sale of olives by F. A. Mennillo to defendant in error which modification was pleaded in defendant's answer (Record, pp. 10 and 12). The answer pleaded and the proof of defendant in error showed that the agreement of the defendant in error to accept the draft sued on was conditioned on the olives being found to be of satisfactory quality upon examination on their arrival in New York. The modification of the agreement between F. A. Mennillo and defendant in error, agreed to by F. Romeo, was certainly material as tending to show

whether the promise to accept the draft was conditional or unconditional and Mrs. Romeo's testimony regarding this conversation was therefore also material.

7. Plaintiff in error on page 43 of its brief also complains generally of the admission in evidence of certain telegrams and communications between F. Romeo and the defendant in error. Plaintiff in error does not, however, refer to any assignment of error in this connection or refer to any rulings in the bill of exceptions. No rulings are quoted, no discussion is attempted and no authorities are cited so that defendant in error does not deem it necessary to answer such vague charges of error.

IV.

MISCELLANEOUS MATTERS.

As all the evidence in the case, of a promise to accept, showed that the promise was oral and not written, the verdict of the jury in favor of the defendant in error will not be disturbed, because under the Uniform Negotiable Instruments Law, which was in effect in California at the time the promise was made (California Statutes 1917, Chapter 751), a promise to accept a bill must be in writing. The Uniform Negotiable Instruments Law was enacted in California as a part of the Civil Code. The portions thereof referred to are as follows:

Furthermore this telegram advised the defendant in error of F. Romeo's negotiations with F. A. Mennillo's agent. Plaintiff in error on cross-examination asked the witness F. Romeo whether he kept his office informed as to the different moves he was making (Record, p. 62). Therefore defendant in error had a right to show exactly what information F. Romeo sent to his office regarding his negotiations with Mr. Mennillo's agent.

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"3213. Acceptance; How Made, etc. The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer. The acceptance must be in writing and signed by the drawee. It must not express that the drawee will perform his promise by any other means than the payment of money."

"3216. Promise to Accept; When Equivalent to Acceptance. An unconditional promise in writing to accept a bill before it is drawn is deemed an actual acceptance in favor of every person who, upon the faith thereof, receives the bill for value."

See

Rambo v. First State Bank of Argentine, 128 Pac. 182 (Kansas, 1912);

Erickson v. Inman & Co., 54 Pac. 949 (Ore., 1898);

Clayton Townsite Co. v. Clayton Drug Co., 147 Pac. 460 (New Mexico, 1915);

Van Buskirk v. State Bank of Rocky Ford, 83 Pac. 778 (Colo., 1905).

The authorities to the contrary cited at pages 30 and 31 of brief of plaintiff in error antedate the Uniform Negotiable Instruments Law.

Plaintiff complains of the instruction of the court on the question whether the plaintiff in error parted with value and suggests that the counsel for defendant in error gave no intimation that there was to be any contention that the plaintiff in error had not parted with actual value for the draft and had not offered any testimony to controvert this point. The

complaint contained the allegation (Record p. 3, paragraph VIII) that Mennillo endorsed the draft to the plaintiff in error for the sum of $5743.63 and the defendant in error denied that Mennillo so endorsed it for said sum or any sum or otherwise (Record p. 8, paragraph IV). The very full evidence submitted on the part of the plaintiff in error and quoted from on pages 39-40 of plaintiff in error's brief shows that the alleged payment for the draft was nothing but a credit and there is no evidence whatever that the credit was ever drawn upon by Mennillo. It is, of course, well settled that the extension of credit by a bank does not constitute giving value until the credit is actually used. McKinzie Ltd v. Parsons, 113 N. W. 858 (2

We submit that the record shows that this case was fairly tried and that no error was committed by the trial court and defendant in error therefore asks that the judgment be affirmed.

Dated, San Francisco,
February 25, 1922.

Respectfully submitted,

O. K. Cushing,
Charles S. Cushing,
William H. Gorrill,
Delger Trowbridge,
Attorneys for Defendant in Error.

No. 3804

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BANK OF ITALY (a corporation),
Plaintiff in Error,

vs.

F. ROMEO & CO., INC. (a corporation),
Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

LOUIS FERRARI,
Attorney for Plaintiff in Error.

No. 3804

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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Defendant in Error.

REPLY BRIEF FOR PLAINTIFF IN ERROR.

The defendant in error states in its brief that it has been considerably embarrassed by reason of the informality in which the plaintiff in error has proceeded with reference to this writ of error. The fact, however, that the defendant in error has devoted such a large portion of its brief to technical objections against the consideration of the substantial points which we have made, would lead to the conclusion that the chief embarrassment of the defendant in error has been to make a logical answer to the claims for reversal we have set forth in our opening brief. In this brief, however, we intend simply to answer said technical objections as we

feel that a complete answer to any other points made on the writ of error will be found in our opening brief.

RULE 24.

Defendant in error further states that it is embarrassed because plaintiff in error did not comply with Rule 24 of this Court in that no precise abstract or statement of the case, or a specification of the errors relied upon is found in our brief. We answer this claim by calling the attention of the Court to the language of Rule 24, as follows:

> "The brief shall contain a concise abstract or statement of the case presenting succinctly the questions involved in the manner in which they are raised."

In the instant case the question involved was presented very pointedly by the pleadings and by the phases into which the lower Court divided said question. We, therefore, in our brief, showed the issue involved as presented by the pleadings and the phases into which the same was divided. We submit and we feel that in doing so we succinctly stated the questions involved and fully complied with said rule. We did not feel we had a right to burden this Court with a long summary of evidence and statements of facts which were unnecessary to be considered by the Court in determining the legal questions presented by the writ of error.

With reference to the second objection of the defendant in error, that we have failed to specify

in our brief the points relied upon, we submit that under appropriate headings we have separately and distinctly set forth the specifications upon which we relied and the facts and arguments in support thereof.

FAILURE TO EXCEPT TO VERDICT.

The defendant in error further makes the point that the plaintiff in error is not entitled to have the question as to whether or not the evidence was sufficient to submit the case to the jury heard, first, because no objection was taken to the verdict, second, no motion was made for a directed verdict and, third, because the assignment of errors did not set forth the particulars in which the evidence was insufficient.

As to the first point, we refer to pages 35, 36 and the first paragraph on page 37 of our brief and submit that the stipulation in question covered the objection to the verdict as well as any other objection necessary to be taken during the trial, as the verdict was a ruling adverse to the plaintiff.

We note that the defendant in error objects to our use of the stipulation found on page 35 of our brief. There is no denial on the part of the defendant in error that the stipulation was entered into and there is not a suggestion that the reporter's transcript, from which said stipulation is taken, is incorrect in any respect. The stipulation, moreover, is in substance repeated in the bill of excep-

tions in the opinion of the trial Court found on page 124 of the transcript. For our purposes it makes absolutely no difference whether this Court takes the stipulation from the reporter's notes or from the opinion of the trial judge on the motion for a new trial. The substance is the same in both.

As to the second point, the questions involving the insufficiency of the evidence are reviewable notwithstanding that no motion was made for a directed verdict by reason of the fact that the Court undertook not only to instruct as to the law, but on the facts and, therefore, if there was no evidence in the record sustaining the contention of the defendant, the Court erred in instructing the jury as to the matters of fact which they could consider in weighing the evidence in favor of the defendant (see page 21, last paragraph, plaintiff's brief).

The claim that the consideration of this point on appeal would be unjust to the trial Court by reason of the fact that the insufficiency of the evidence was not called to the attention of the trial Court loses all its weight in this case by reason of the fact that a motion for a new trial was made in this case and the insufficiency of the evidence to sustain the judgment was called to the attention of the trial Court and the trial Court had as good (if not a better) opportunity to pass on said point than if the motion to advise the jury to acquit had been made at the conclusion of the case.

With reference to the alleged defect in the assignment of errors, it is pointed out that Assignment

No. 16 (Tr. folio 106, page 135) referred to the error of the Court in denying the motion of the plaintiff for a new trial and the transcript contains the petition for a motion for a new trial which sets forth the insufficiency of the evidence with extreme particularity (Tr. pages 16-17) and it would have served no useful purpose to have had said specifications repeated in the assignment of errors. It, therefore, appears that this contention is devoid of substantial merit and is purely a technical objection.

CONSIDERATION OF INSTRUCTIONS.

An answer to the objection of the defendant in error to the consideration of this Court of the instructions of the trial Court is found on pages 34, 35, 36 and the first paragraph of 37 of our opening brief.

PLAIN ERROR.

But even if the technical objections of this defendant in error are well founded in a case as we have shown where no substantial injury has been done to either the trial Court or the opposing counsel by the failure of the appellant to observe the technical requirements complained of, this Court will in the interests of justice, notice a plain error even where the same has not been excepted to or assigned.

Subdivision IV, Rule 24:

> "Errors not specified according to this rule, but the Court at its option, may notice a plain error not assigned or specified."

McBride v. Neal, 214 Fed. Rep. 966 (7th Circuit), from which we quote at page 969:

> "An assignment of errors is the pleading of the party seeking a reversal; and this court is always disposed to disregard any technical questions regarding the form or sufficiency of such a pleading, if it can be deemed sufficient to apprise the adversary of the grounds of reversal that are intended to be presented to the court; and we are also always disposed to note a substantial error which has been entered into the judgment, whether it has been properly assigned or not, and even if there is no assignment."

Central Improvement Co. v. Cambria Steel Co. et al., Guardian Trust Co. v. same, 201 Fed. Rep. page 811, reading from page 818:

> "And under rule 11 of this court a plain error not assigned may be, and ought to be, considered where the failure to consider it would result in a great injustice. United States v. Bernays, 158 Fed. 792; New York Life Ins. Co. v. Rankin, 162 Fed. 103; United States v. Tennessee, etc. R. R. Co., 176 U. S. 242. And in view of the facts that the issue here has been long and persistently contested below, that exception was taken and assignment of error made regarding it, *though upon an erroneous ground,* that both parties have prepared exhaustive briefs upon the question which the Trust Company asks us to review, that neither party can be taken by surprise, and that a failure to review the legal conclusion below

> would result in an unjust final adjudication of the issue under consideration, we are constrained to consider and decide it."

Pennsylvania Co. v. Sheeley, 221 Fed. Rep. page 901, reading from page 906:

> "However, there is one matter which must be considered 'plain error', so that it is our duty, under rule 11, to notice it without sufficient exception or assignment. The case was tried some months before the Supreme Court in Norfolk Co. v. Earnest, 229 U. S. 114, had formulated the rule of damages in cases of contributory negligence, and while the rule, as given by the court below to the jury, was in some respects more favorable to the defendant than it should have been, yet, upon the subject of proportioning damages, it can at least be said that the jury could not well have understood the rule to be as the Supreme Court has said it is; and it seems probable that the jury did not make allowance for contributory negligence as the statute requires. There must, therefore, be another trial, unless this error can be cured by a remittitur."

It will therefore be seen from the foregoing citations that the growing tendency of courts of appeal is to disregard the technical objections to a consideration of points when said points appear in the record and involve the substantial rights of the parties. In this case, as we have seen, no one has been taken by surprise, no one has lost any rights, the points in question are fully argued and presented in the briefs of the parties and substantial justice will only be done by a consideration of the merits of the points made by appellant for reversal and it

is therefore respectfully submitted that the technical objections made by the defendant in error to the consideration of the insufficiency of the evidence and a review of the instructions of the Court should be overruled and that the writ of error sued out by the plaintiff in error should be decided on its merits.

Dated, San Francisco,
March 20, 1922.

Respectfully submitted,

LOUIS FERRARI,

Attorney for Plaintiff in Error.

No. 3804

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Plaintiff in Error,

vs.

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REPLY BRIEF FOR DEFENDANT IN ERROR.

O. K. CUSHING,
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EXPLANATION OF LETTERING OF CERTAIN EXHIBITS.

Before commenting on the reply brief of plaintiff in error we desire to call the attention of the court to the fact that some confusion may arise with regard to the exhibits which form a part of the record in this case because among the exhibits introduced at the trial were several which were attached to the depositions of Romeo, Lodato, Longo, Grasso and Galanos filed in this court on February 27, 1922, under a stipulation and order. These defendants' exhibits are lettered "A" to "U4" both inclusive, and are entirely different from the original exhibits of defendants lettered "A" to "F", which were not attached to the depositions and which were filed

in this court as a part of the record on appeal on December 1, 1921. In our opening brief in referring to defendants' exhibits by letter we were in all cases except two referring to the exhibits attached to the depositions above mentioned. On pages 29 and 30 of our opening brief in referring to exhibits "B" and "C" the original exhibits not attached to the depositions were meant. On page 28 we discussed a contract between defendant in error and F. A. Mennillo which was known as exhibit "A", referring to one of the original exhibits not attached to the depositions.

DISCUSSION OF REPLY BRIEF OF PLAINTIFF IN ERROR.

We do not find it necessary to reply to the arguments made in answer to the technical points we urged in our opening brief and we submit those propositions on our points and authorities already on file. We desire, however, to point out that plaintiff in error has made no answer to the proposition that it is not entitled to complain of the insufficiency of the evidence to justify the verdict because the bill of exceptions before this court does not contain any specifications of insufficiency of the evidence. In addition to the authorities cited by us on this point at page 7 of our opening brief, we cite the following recent California cases:

Gosliner v. Briones, 62 Cal. Dec. 659; 204 Pac. Rep. 19, decided December 14, 1921;

Edwards v. Wilson, 36 Cal. App. Dec. 1048; 204 Pac. 39, decided December 21, 1921.

Furthermore plaintiff in error attempts to evade the issue on the proposition that it cannot contend here that the verdict is against law because it did not move for a directed verdict at the conclusion of the case, when it contends as follows:

> "No motion was made for a directed verdict by reason of the fact that the court undertook not only to instruct as to law, but on the facts and, therefore, if there was no evidence in the record sustaining the contention of the defendant, the court erred in instructing the jury as to the matters of fact which they could consider in weighing the evidence in favor of the defendant".

Plaintiff in error does not and of course cannot cite any authorities for this novel attempt to lift itself by its boot-straps. The law is clear as shown by the cases cited by us on pages 6 and 7 of our opening brief that the required motion for a directed verdict must be made at the conclusion of the presentation of the evidence and *before* the court instructs the jury generally. The instructions given by the trial court, no matter what their content, could not possibly relieve plaintiff in error from its default in failing to ask for a directed verdict *before* the trial judge commenced to charge the jury.

With regard to the instructions, we note that plaintiff in error has not replied to the suggestion on page 21 of our opening brief, that at most it could only discuss one proposition in the charge to the jury because only one attempt at a specific exception to the charge appears in the record (Record,

p. 123). We reiterate our contention that this attempt to take an exception not in the presence of the jury was futile. (Brief for Defendant in Error, pp. 26-27.)

In not referring to the other technical points argued in our opening brief we are not admitting the validity of plaintiff in error's reply to them.

For the reasons given in our opening brief and herein we request that the judgment be affirmed.

Dated, San Francisco,
April 1, 1922.

Respectfully submitted,
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William H. Gorrill,
Delger Trowbridge,
Attorneys for Defendant in Error.